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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 22

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (Detroit Gear Division), APPELLANTS,

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Filed October 8, 1956

Probable Jurisdiction Noted January 14, 1957

(File Endorsement Omitted)

IN THE SUPREME COURT

OF THE STATE OF MICHIGAN

Appeal from the Circuit Court for the County of Wayne
Honorable Herman Dehnke, Circuit Judge

(By Assignment)

No. 46,702.

UNITED STATES OF AMERICA and BORG-WARNER CORPORATION (Detroit Gear Division), an Illinois Corporation, *Co-Plaintiffs and Co-Appellants,*

v.

CITY OF DETROIT, a Municipal Corporation, *Defendant and Appellee.*

Record on Appeal—Filed December 12, 1955

GLENN M. COULTER,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation, Co-Plaintiff and Co-Appellant,
1703 Ford Building, Detroit 26, Michigan.
FRED W. KAESS, United States Attorney,
JOHN L. OWEN, Assistant United States Attorney,
Attorneys for United States of America, Co-Plaintiff and Co-Appellant,
869 Federal Building, Detroit 31, Michigan.
PAUL T. DWYER, Corporation Counsel,
BERT R. SOGGE, Assistant Corporation Counsel,
JULIUS C. PLISKOW, Assistant Corporation Counsel,
Attorneys for City of Detroit, a Michigan Municipal Corporation, Defendant and Appellee,
1010 City-County Building, Detroit 26, Michigan.

2 IN CIRCUIT COURT OF WAYNE COUNTY

Declaration of Plaintiffs—Filed September 14, 1954

Come now the United States of America, by its attorneys, Fred W. Kaess, United States Attorney, and John L. Owen, Assistant United States Attorney, who allege that this action is brought by the United States Attorney,

for the United States of America at the direction of the Attorney General of the United States to unite with Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, co-plaintiff, in the obtaining of the relief sought herein for the use and benefit of the United States of America, and Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, by its attorney, Glenn M. Coulter, co-plaintiff herein, filing this declaration as commencement of suit, and say:

1. That plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, is, and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and is duly licensed and admitted to do business within the State of Michigan. Defendant, City of Detroit, is a municipal corporation, being a political subdivision of the State of Michigan, and located in the County of Wayne of said State of Michigan.

2. On the 6th day of February, A.D. 1954, plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, received from the Board of Assessors of said City of Detroit a notice that real property located at 11111 French Road, Detroit, Michigan, has been placed on the 1954 personal property assessment rolls for a total assessment of $352,060.00. Subsequent thereto and prior to July 1, 1954, plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, received a general city tax bill from the said City of Detroit, assessing against it as a personal property tax for the fiscal year 1954, and based upon the aforedescribed assessment, a total school and city tax in the amount of $12,323.50. Said tax bill recites that the tax so levied was assessed under the provisions of Act 189, Public Acts of 1953, of the State of Michigan.

3. On August 16, 1954, plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, paid to Charles N. Williams, Treasurer of the City of Detroit, the amount of $6,161.75, representing one-half of the aforedescribed total 1954 tax assessed, said payment being made under written protest which accompanied the check in payment thereof. A copy of said tax

bill, the check of plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, in payment of said amount of $6,161.75, and the written protest which accompanied said payment are attached hereto and made a part hereof as plaintiffs' Exhibits 1, 2, and 3, respectively, of this declaration; plaintiffs showing that such protest was in writing signed by a duly authorized agent and officer of Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, and specified the grounds for such protest of the tax in question.

4. Plaintiffs show unto this Court that prior to the 1st day of January, 1954, and on and ever since said date, the full and absolute title and ownership to the real property and buildings located thereon at 11111 French Road, Detroit, Michigan, so assessed, as described above, was in the United States of America, one of the plaintiffs herein.

5. Plaintiffs show that on January 1, 1954, and ever since that date, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, has been in possession of said premises at 11111 French Road, Detroit, Michigan, solely as a lessee for a term of years under the provisions of a written lease between the United States of America and Borg-Warner Corporation (Lease No. (R)-60040) dated March 8, 1948, said lease having been amended by written amendment thereto dated December 1, 1952. Plaintiffs show that other than the leasehold interest under the provisions of said written lease as amended, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, has no ownership of any nature in such real property or buildings so assessed by the City of Detroit.

6. Plaintiffs show that under the terms and provisions of the first amendment to the aforedescribed lease between the plaintiffs hereto, said amendment being dated December 1, 1952, there was added the following provision to said lease (amending Article 6—Rent):

"Provided, further, that, effective March 8, 1954, and throughout the remaining term of the extended

lease, Borg-Warner shall deduct and pay from the stipulated semi-annual rental installments any taxes assessed against it under the provisions of Public Act 189 of the State of Michigan for the year 1953 or other taxation statutes coming into effect during the extended term of the lease and which attempt to tax Borg-Warner on the basis of the assessed value of the Facilities leased to it or on the basis of the value of its leasehold interest therein or for any other reason because of its use and occupancy of the same under this lease. Borg-Warner will pay the personal taxes assessed against its own property located in said Facilities. The Government reserves the right to contest the legality of said Public Act 189 or any other of such described taxation statutes coming into effect during the extended term of the within lease, and, should it successfully do so, Borg-Warner shall repay to the Government any taxes actually refunded by such determination. Borg-Warner agrees to cooperate with the Government in respect to such possible litigation, including the payment of such taxes under protest, if so required by the Government."

Plaintiffs show that on the 7th day of September, 1954, plaintiff Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, deducted from a rental payment made under said lease to the United States of America the sum of $6,461.75, in accordance with the above quoted provision of the amendment to said lease.

7. Plaintiffs show that the aforedescribed tax levied on the land and buildings leased by it at 11111 French Road, and assessed thereto, is illegal, and that plaintiffs should be entitled to recover the amount so paid on August 16, 1954, for the following reasons (all of which are recited in plaintiff Borg-Warner Corporation's (Detroit Gear Division), an Illinois corporation, written protest dated August 16, 1954, which accompanied payment of said tax):

(a) The assessment by the City of Detroit as described above violates and is repugnant to the provisions

of the Constitution of the United States and the Constitution of the State of Michigan, and is therefore invalid, void and illegal, because at the date of such assessment (January 1, 1954) and ever since said date, the real estate and buildings so assessed was and are owned solely by the United States of America, and such
6 real property and buildings thereon were at the date of said assessment and ever since wholly exempt and immune from taxation by the City of Detroit.

(b) The aforedescribed tax was levied and authorized by Act 189, Public Acts of 1953 of the State of Michigan (Michigan Statutes Annotated 7.7 (5)), which provides as follows:

"(An Act to provide for the taxation of lessees and users of tax-exempt property.)

The People of the State of Michigan enact:

Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business, conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property; Provided, however, that the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for

which the taxes were assessed and shall be recoverable by direct action of assumpsit."

which statute violates and is repugnant to the provisions of the Constitution of the United States of America and the Constitution of the State of Michigan and is therefore invalid, void and illegal in that said statute proposes a tax upon real property owned by the United States of America, which property is exempt and immune from taxation by the City of Detroit by virtue of said Constitutional provisions.

(1) The statute in question specifically calls an ad valorem tax on the exempt real property itself, and not upon the legal or equitable interest in said property of the lessee or user thereof, and imposes said tax as though the lessee or user were the owner of such property—although said lessee or user is the person on whom said tax is assessed.

(2) Said statute attempts to tax indirectly what cannot be done directly by the City of Detroit, i. e., the property of the United States of America.

(3) Plaintiffs show that there is in existence no waiver of the immunity of said real property and buildings so taxed by the City of Detroit from taxation, nor consent to such taxation of Federally owned property given by the Congress of the United States of America.

(c) Such statute results in the placing of a direct burden upon the United States of America for the full amount of such tax, in that under the aforedescribed written lease, as amended, between the United States of America and Borg-Warner Corporation, the United States of America assumes ultimate financial responsibility for any taxes levied by any political subdivision or any municipal corporation against said real property, and by so placing the direct and ultimate financial burden of said tax upon the United States Government, such statute is violative of the provisions of the Constitution of the United States.

(d) The statute (Act 189 of Public Acts of 1953) on which the aforedescribed tax by the City of Detroit is based and authorized is violative of the provisions of the Constitution of the United States and of the Constitution of the State of Michigan, in that the assessment thereof constitutes a deprivation of the property of Borg-Warner Corporation (Detroit Gear Divisions), an Illinois corporation, without due process of law and is discriminatory as to Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, for the following reasons:

(1) Said statute is vague, uncertain and incomplete in that Section 1 thereof fails to state who or what is subject to taxation, and Section 2 thereof fails to state what taxes shall be assessed and further fails to adequately describe which lessees or users of real property are to be assessed and taxed thereunder.

(2) Said statute discriminates against plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, as against other lessees of tax exempt real property, in that said statute in no way gives consideration to the nature or extent of the leasehold interest of the person so assessed and the provisions of its lease with the owner of such real property.

(3) Said statute authorizes a tax against plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, on property which is, in fact, solely owned by another person.

(e) Said statute is violative of Article X, Section 6, of the Constitution of the State of Michigan in that it specifically refers to the provisions of the general property tax law of that State to fix the tax and the object thereof.

(f) Said statute violates the provisions of Article X, Section 4, of the Constitution of the State of Michigan in that it does not provide a uniform rule of taxation upon the class of property which it operates.

(g) Said statute violates the provisions of Article X, Section 7, of the Constitution of the State of Michigan in that it fails to assess the interest of Borg-Warner Corporation in the real estate subject to said tax at its true cash value, but rather attempts to tax it as if it were the owner of real property which, in fact, it does not own (but as to which its sole interest is that of a lessee for a fixed term of years).

(h) Said statute is violative of the Constitution of the United States, and particularly the Fourteenth Amendment thereto, in that it denies to plaintiff the equal protection of the law by taxing to plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, real property which, in fact, is owned by another.

8. Plaintiffs further show that the aforedescribed tax assessed and levied against plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, in relation to property leased by it at 11111 French Road, Detroit, Michigan, is invalid in that said assessment and levy were made by the City of Detroit on its personal property tax rolls and as if said property so assessed and taxed were personal property, plaintiffs making specific reference to the tax bill of the City of Detroit in question, being Exhibit 2 hereof. Plaintiffs show that such assessment and tax is therefore not in conformity with Act 189, Public Acts of 1953, which is a statute authorizing a tax against real property only, and that even if such statute were held constitutional and valid (all of which plaintiffs most vigorously deny), the specific assessment and tax here in question were not made in conformity with such statute and are therefore wholly void.

9. Plaintiffs show that they bring this action in assumpsit against the City of Detroit under the provisions of Compiled Laws of 1948, Section 211.53, Michigan Statutes Annotated 7.97, being Section 53 of the General Property Tax Act of the State of Michigan, and further show that they have done all things required under said statute to recover a tax illegally assessed and levied against it.

Wherefore plaintiffs pray that they may have judgment against defendant herein in the amount of
11 $6,161.75, together with interest thereon from August 16, 1954, and costs and attorney fees most wrongfully sustained.

Dated at Detroit, Michigan, this 14th day of September, A. D. 1954.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation, Plaintiff,
1703 Ford Building,
Detroit 26, Michigan.

(Sgd.) Fred W. Kaess,
United States Attorney,

(Sgd.) John L. Owen,
Asst. U. S. Attorney,
Attorneys for United States of America,
869 Federal Building,
Detroit 31, Michigan.

12 **Exhibit 1 to Declaration**

Voucher Number 8-87 No. 103347

DETROIT GEAR DIVISION
Borg-Warner Corporation
12345 Kercheval Ave.
Detroit 14, Mich.

August 13, 1954

Pay to the order of Chas. N. Williams,
City Treasurer ..... $6,161.75.

Detroit Gear Division
Borg-Warner Corporation

To A16322 Royden Walters
National Bank of Detroit S. J. Auer
9-32 Detroit, Mich.

Stamped on back:

Pay to the order of Bank of the Commonwealth, Detroit, Michigan, for deposit only, City of Detroit, Chas. N. Williams, City Treasurer.

Paid under Protest Detroit 8-16-54

Paid thru Detroit Clearing House Aug. 17, 1954 or pay to the order of any bank or banker, all prior endorsements guaranteed. Bank of the Commonwealth, Detroit, Mich.

13 **Exhibit 2 to Declaration**

Paving Sewer, Sidewalk or Other Special Taxes not included in this bill

Fiscal Year 1954 City Taxes
July 1, 1954 to June 30, 1955

CITY OF DETROIT

General City Tax Bill

This tax may be paid in two parts if one-half is paid on or before August 15, 1954, and balance is paid on or before January 15, 1955.

WARD ITEM No.

Borg-Warner, Det Gear
12345 Kercheval
Detroit 15, Mich.

Leased
Act Land
189 Bldg
PA 1953

PERSONAL

Paid Under Protest

Property Assessed at

11111 French Rd

PAID
Aug. 16, 1954
CITY OF DETROIT
Chas. N. Williams
City Treasurer

John W. Witherspoon
City Controller
1954

Make checks payable to
Chas. N. Williams, City Treasurer

PAY
THIS or THIS

Valuation Dollars	School Tax Dollars Cts.	City Tax Dollars Cts.	Total Tax Dollars Cts.	Half Tax Dollars Cts.
352060.	4509.88	7813.62	XXXXXX	6161.75

Interest to
Total

A10322

See Information on reverse side

Exhibit 3 to Declaration

PROTEST

We have received a statement for City of Detroit 1954 personal property taxes on leased land and building at 11111 French Road, Detroit, Michigan, said taxes being levied under Act 189, Public Acts 1953 of Michigan. The tax called for is in the total of $12,323.23, based upon an alleged assessment of $352,060.00. It is our understanding that unless these taxes are paid, it is mandatory on the Treasurer of the City of Detroit to enforce the collection thereof by judicial proceedings.

We wish to notify you that we are paying to the City of Detroit, at this time, the sum of $6,161.75, being the first one-half of the taxes levied against us for the year 1954 under the aforedescribed tax statement, but this payment is made under protest and under duress and under threat of the imposition of penalties. We intend to bring suit to recover the amount paid herewith or a portion thereof, together with interest, in accordance with the laws and statutes in such case made and provided. The grounds of our protest are as follows:

1. The assessment and the statute (Act 189, P. A. 1953) on which this tax is based are violative of the Constitution of the United States and of the State of Michigan, in that the assessment and the proposed tax are imposed upon real property owned by the United States Government, which property is exempt from taxation by the City of Detroit.

2. Act 189, P. A. 1953, is violative of the Constitution of this State and the United States in that it is a discriminatory tax and deprives us of our property
15 without due process of law, and of the equal protection of the law.

3. Michigan Public Act 189, 1953, is violative of the Constitution of this State in that it fails to meet the constitutional requirements of uniformity and equality of ad valorem taxation of real property, and that assessments shall be fixed at true cash value.

4. The Action of your department in placing said assessment on the personal property assessment rolls is im-

proper, in that said invalid statute purports to authorize assessment, and a tax thereon, upon real property. Further, if such assessment were judicially determined to be a proper assessment on personal property, it would subject us to double taxation in violation of the Constitution of this State.

Detroit Gear Division of Borg-Warner Corporation, an Illinois Corporation,

By: s/ Royden Walters,
Secretary-Treasurer
12345 Kercheval,
Detroit 14, Michigan

Dated: August 16, 1954.

Received the foregoing protest and the check referred to therein.

s/ Chas. N. Williams—RMM
(Treasurer of the City of Detroit)

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16 IN CIRCUIT COURT OF WAYNE COUNTY

Answer and Special and Affirmative Defenses—Filed October 19, 1954

Now comes the City of Detroit, a municipal corporation, made defendant in the above entitled cause, and for answer to the declaration heretofore filed, respectfully shows to the Court:

1. That it admits the matters set forth in paragraph one of said declaration.

2. That it denies that the notice mentioned in paragraph two covered all the real property at 11111 French Road, Detroit, Michigan; and further denies that the general City tax bill mentioned in said paragraph was based on the assessment as aforedescribed therein but says it was based on that portion thereof which was used and occupied by and leased to plaintiff Borg-Warner Corporation by the United States of America in connection with said Corporation's business conducted for profit.

3. That it admits the allegations in paragraph three contained with the exception of the validity of the grounds of the written protest therein referred to and denies the legal sufficiency thereof.

For further answer defendant says that the assessment in question is a valid, legal, uniform and lawful assessment and was not made against the United States of America, its operations or instruments or any of its property being used for governmental functions or public purposes.

17 For further answer defendant shows that plaintiffs have failed to exhaust their administrative remedies, will show that plaintiffs have not complied with the provisions of Title VI, Chapter II, Sections 4, 5 and 6 and other pertinent provisions of the Detroit Charter and will show that plaintiffs have not conformed to the requirements of Ordinance 375-E of the Compiled Ordinances of 1945, a copy of which Ordinance is hereto attached and marked Exhibit 1; and that plaintiffs have failed to comply with the provisions of Sections 211.29 and 211.30 of the Compiled Laws of Michigan, 1948.

4. That it neither admits nor denies the matters in paragraph four although it believes same to be true and therefore leaves plaintiffs to their proofs as to the ownership of the real property and buildings at 11111 French Road, Detroit, Michigan. However, defendant denies that same were assessed qualitatively as alleged therein but only quantitatively inasmuch as the assessment made by the defendant was based on that portion thereof which was used and occupied by and leased to the plaintiff Borg-Warner Corporation by the United States of America in connection with said Corporation's business conducted for profit.

For further answer defendant says that the assessment in question is a valid, legal, uniform and lawful assessment and was not made against the United States of America, its operations or instruments or any of its property being used for governmental functions or public purposes.

5. That it admits the matters set forth in paragraph five except as to the date of amendment of the lease and except as to the last sentence of said paragraph which defendant neither admits nor denies and leaves plaintiff Borg-Warner Corporation to its proofs.

18 6. That it neither admits nor denies the matters set forth in paragraph six for lack of information sufficient to form a belief and therefore leaves plaintiffs to their proofs.

7. Defendant denies each and every allegation, presumption, premise and conclusion, both legal and factual, in paragraph seven contained and in support of same will rely on the provisions of the General Property Tax Law of the State, as amended by Act 189 of 1953, and the Charter of the City of Detroit.

(a) Defendant denies each and every allegation, presumption, premise and conclusion, both legal and factual, in subparagraph (a) and particularly denies that the assessment in question is repugnant to the Constitution of the United States and the Constitution of the State of Michigan for the reasons heretofore given.

(b) Defendant admits that the tax in question was levied and authorized by Act 189 of the Public Acts of Michigan, 1953, but denies the remaining allegations of sub-paragraph (b) for the same reasons heretofore given.

(1) Defendant makes no reply to the matters set forth in sub-paragraph one, same being conclusions of law for the Court to consider and determine.

(2) Defendant denies the matters set forth in sub-paragraph (b) (2), and says no tax was laid upon the United States of America or any of its property being used for governmental functions or public purposes.

19 (3) Defendant makes no answer to the matters set forth in sub-paragraph (b) 3, same being based on an incorrect, unfounded assumption which results in an erroneous inapplicable conclusion of law.

Further answering, defendant shows that the assessment in question is a valid, legal, uniform and lawful assessment and was not made against the United States of America, its operations or instruments or any of its property being used for governmental functions or public purposes.

(c) That it denies each and every allegation, presumption, premise and conclusion in sub-paragraph (c) and particularly denies that the Statute in question is violative of the provisions of the Constitution of the United States.

Further answering defendant shows that the amendment to the lease referred to therein was executed for Borg-Warner Corporation on February 23, 1954 and for the United States of America on March 3, 1954 although purporting to be effective December 1, 1952.

Further answering defendant shows that Act 189 in question here was adopted June 10, 1953 and the first tax levied thereunder was based on an assessment on January 1, 1954, the tax date provided by law in this State which was prior to the date of execution of said amendment to plaintiff's lease.

(d) That it denies each and every allegation, presumption, premise and conclusion, both legal and factual, in sub-paragraph (d) and each and every of the sub-paragraphs (1), (2) and (3) thereunder.

(e) That it denies each and every allegation, presumption, premise and conclusion, both legal and factual, in sub-paragraph (e), (f), (g) and (h).

7. That it denies that the subject tax is invalid or not in conformity with the Act 189, Public Acts of Michigan, 1953, as alleged in the second paragraph numbered seven (7), and denies that same is void for the reasons stated therein or for any reason whatsoever.

8. That it denies that the plaintiffs have done all things required under the Statutes of the State of Michigan prior to bringing suit to recover taxes and shows that plaintiffs have failed to exhaust their administrative remedies, have not complied with the provisions of Title VI, Chapter II, Sections 4, 5 and 6 and other pertinent provisions of the Detroit Charter, have not conformed to the requirements of Ordinance 375-E of the Compiled Ordinances of 1945, a copy of which ordinance is hereto attached and marked Exhibit 1, and have failed to comply with the provisions of Sections 211.29 and 211.30 of the Complied Laws of Michigan, 1948.

That it denies each and every other allegation in the declaration not otherwise admitted, controverted or specifically denied.

That it denies that plaintiffs are entitled to the sum claimed or any sum whatsoever and therefore asks that the declaration be dismissed and plaintiffs' action held for naught.

SPECIAL AND AFFIRMATIVE DEFENSES

And now comes the defendant and by way of special and affirmative defenses says as follows:

1. The matters alleged do not constitute a cause of action at law.

2. Neither the Constitution of the United States nor the Constitution and Statutes of the State of Michigan confer constitutional immunity from non-discriminatory State taxation for the private benefit of plaintiff, Borg-Warner Corporation.

3. No tax has been laid on the United States Government, its property interest, or its operations in the case at hand by virtue of the General Property Tax Act of Michigan as amended by Act 189, Public Acts, 1953.

4. No interference with or lien against the title of the United States Government in the subject property is indicated or applied by Act 189, Public Acts, 1953, or by defendant's construction thereof.

5. Neither the United States of America, or any of its instrumentalities or the operations thereof are subjected to interference or the incidence of the tax herein.

6. The tax in question was levied only against the party in possession based on its lease which gave it the use of the subject real estate in connection with its business conducted for profit.

7. Plaintiff Borg-Warner Corporation is estopped from claiming the benefit of governmental immunity from non-discriminatory taxation.

8. Plaintiff Borg-Warner Corporation is estopped from seeking a favorable position in regard to State non-discriminatory taxes, the result of which would cause all re-

maining taxpayers in the same category to be discriminated against and violate the constitutional principle of uniformity.

9. Plaintiff Borg-Warner Corporation is estopped to deny that it is subject to all general local laws pertaining to the matters set forth in its declaration.

22 10. That plaintiffs have not exhausted their administrative remedies, in support of which defendant will show:

(a) That plaintiffs have not complied with provisions of Title VI, Chapter II, Sections 4, 5 and 6 and other pertinent provisions of the Detroit City Charter;

(b) That plaintiffs have not conformed to requirements of Ordinance 375-E of the Compiled Ordinances of 1945, a copy of which ordinance is attached to this Answer, marked Exhibit 1;

(c) That plaintiffs have failed to comply with provisions of Sections 211.29 and 211.30 of the Compiled Laws of 1948 of Michigan.

Based on all of which defendant will move to dismiss the within cause at the hearing thereof when same is assigned for trial.

Further defendant denies that plaintiffs are entitled to judgment in the amount claimed or any amount whatsoever and asks that the said cause be dismissed with costs.

City of Detroit, a Michigan municipal corporation, Defendant,

By Paul T. Dwyer,
Corporation Counsel,
Bert R. Sogge and
Julius C. Pliskow,
Assistants Corporation Counsel

By Bert R. Sogge and
Julius C. Pliskow,
Attorneys for said Defendant,
301 City Hall,
Detroit 26, Michigan.

Dated: October 18, 1954.

Exhibit 1 to Answer

ORDINANCE NO. 375-B

(Make notation on page 149)

TAX DAY—BOARD OF REVIEW

AN ORDINANCE to establish a tax day for the City of Detroit and to provide for an annual review of the assessment of real and personal property for general city taxes.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. In the year 1950 and each year thereafter, the first day of January shall be deemed the tax day in the City of Detroit. The taxable status of persons and real and personal property shall be determined as of said date. Notice that the assessment rolls are prepared as of the first day of January and will be completed and available for inspection beginning February first, shall be given as provided by the Charter of the City of Detroit. All general city taxes levied upon real and personal property shall become a debt against the owner on January 1, 1950, and on January first each year thereafter.

Sec. 2. Any person considering himself aggrieved by reason of any assessment may make complaint on or before February 15th, either orally or in writing, before the Board of Assessors, and on sufficient cause being shown by the affidavit of such persons, or by oral proof, or by other evidence, to the satisfaction of such Board, it shall review the assessment complained of and
24 may alter or correct the same as to the person charged thereby, the property described therein, and the estimated value thereof. The concurrence of a majority of the Board shall be sufficient to decide the question of altering or correcting any assessment complained of. The Board shall forthwith notify all persons complaining of the action of the Board with reference to the assessment or assessments complained of. The period for the review by the Board of Assessors shall be February 1st to February 15th, inclusive, each year. The period for revision and correction of the rolls by the Board of Assessors shall begin February 16th and shall conclude on the

first Monday in March each year. The Board of Assessors having completed the review, revision and correction of said assessment rolls, shall sign, and on the first Tuesday next following the first Monday in March each year, return the same to the Common Council. The completion and signing of the auxiliary book of the Board of Assessors' office shall be deemed a completion of the rolls and the receipt by the Council of a communication from the Board of Assessors announcing the completion of the rolls shall be deemed a delivery of said rolls to the Council. Any person, firm or corporation owning taxable personal property may file their sworn statement as required by law at any time prior to February 15th each year; such statement shall list the personal property owned by such person, firm or corporation upon January first immediately preceding, except that inventories of goods, wares, materials, merchandise and supplies such as are commonly used in trade or commerce or manufacture may be shown in the total of such inventories for each of the twelve months preceding such first day of January or each of the months of the last preceding fiscal year of such owner.

Sec. 3. The Common Council, after receiving said assessment rolls, shall at ten o'clock A. M. on the Tuesday next following the first Monday in March, 1950, and the same each year thereafter, proceed to consider the same, and any person who has previously complained to the Board of Assessors as herein provided in Section 2, considering himself aggrieved by the assessment of his property, and the decision of the Board of Assessors thereon, may appeal to the Council; such appeal shall be in writing and shall state, specifically, the grounds thereof and the matter complained of; together with the address of the complainant, and no other matter in connection therewith shall be considered by the Council. Such appeal shall be filed on or before the Tuesday following the first Monday in March and may not be filed thereafter. The Council may refer such assessment rolls and appeals to a Committee of the Council for consideration. The Committee shall give notice to any person who has filed an appeal, as above provided, of the time and place of the meeting for the hearing thereof, which notice may be made in writing by delivering the same to such person or leaving the same at his place of residence or place of business

with some other person of proper age and discretion, or by mail to the address of such complainant. While acting upon said assessment rolls or appeals, any member or employee of said Board of Assessors may, and on request of the Council or such Committee by resolution, shall meet with said Council or Committee, and make such explanations as he may deem requisite in any case.

Sec. 4. The Council or Committee shall hear and determine all appeals in a summary manner and correct any errors which they may discover in the assessment rolls; ~~shall place thereon the names of any persons and~~ the descriptions of any property not already assessed and assess the same; and may increase or diminish any assessment as they see fit; Provided, That the Council or such Committee shall not increase any assessment without giving a reasonable opportunity to persons owning or having charge of the same, if known, to appear and object thereto. The consideration of the assessment rolls and hearing of appeals may be continued from session to session of a period not less than five (5) days or exceeding sixteen (16) days after the date of their delivery to the Council. The Committee shall make a report to the Common Council in the premises and the Council may adopt, change or amend the same, in whole or in part. After due consideration thereof, said rolls shall on or before the first Monday in April be fully and finally confirmed by the Council, and shall remain as the basis, according to property valuation, of all taxes to be levied and collected in the City until another assessment shall have been made and confirmed as herein provided. In the event that any date set forth in this ordinance falls on a Sunday or legal holiday, such time shall be extended to the next succeeding business day.

Sec. 5. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

(JCC 2948, Sept. 27, 1949).
Passed Oct. 4, 1949.
Approved Oct. 11, 1949.
Published Oct. 12, 13, 14, 1949.
Effective Nov. 10, 1949.

Thomas D. Leadbetter,
City Clerk.

27 IN CIRCUIT COURT OF WAYNE COUNTY

Reply of Plaintiffs to Answer and Special and Affirmative Defenses of Defendant—Filed January 12, 1955

Now comes United States of America, by its attorneys, Fred W. Kaess, United States Attorney, and John L. Owen, Assistant United States Attorney, on behalf of and at the direction of the Attorney General of the United States of America, and Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, by its attorney, Glenn M. Coulter, which parties are co-plaintiffs herein, and make reply to the answer and special and affirmative defenses filed herein by defendant, and say:

REPLY TO ANSWER OF DEFENDANT

1. Co-plaintiffs deny each and all of the allegations and affirmative matter contained in the answer of defendant and specifically all such allegations and affirmative matter contained in paragraphs (1) through (8), inclusive, of said answer, plaintiffs showing that all such affirmative matter is reiterated by the said pleading of defendant under the entitlement "Special and Affirmative Defenses", and to which specific denials are hereinafter made.

2. Plaintiffs admit, however, that the assessment mentioned in paragraph (2) of its declaration and in paragraph (2) of defendant's answer was based only on that portion of real property at 11111 French Road, Detroit, Michigan, which was used and occupied and leased to plaintiff Borg-Warner Corporation by the United States of America.

28 ANSWER OF PLAINTIFF TO SPECIAL AND AFFIRMATIVE DEFENSES

And now come co-plaintiffs herein and make answer to the specific special and affirmative defenses set forth by defendant on pages (5) through (7) of the said answer of defendant, and say as follows:

1. Plaintiffs deny the matters set forth in paragraph 1 thereof.

2. Plaintiffs admit the conclusion of law set forth in paragraph 2 thereof is a correct statement, but say that the state tax in question in this litigation is discriminatory and that said state tax violates the constitutional immunity of the United States of America against taxation by the State of Michigan on any of its governmental subdivisions, and that said statement of law is therefore immaterial and irrelevant to the issues raised by the declaration of plaintiff.

3. That plaintiffs deny the allegations contained in paragraph 3 thereof.

4. That plaintiffs deny the allegations contained in paragraph 4 thereof.

5. That plaintiffs deny the allegations contained in paragraph 5 thereof.

6. That plaintiffs deny the allegations contained in paragraph 6 thereof.

7. That plaintiffs deny the allegations contained in paragraph 7 thereof.

8. That plaintiffs deny the allegations contained in paragraph 8 thereof.

9. That plaintiffs deny the allegations contained in paragraph 9 thereof.

29 10. Plaintiffs deny the allegations contained in paragraph 10 thereof, including sub-paragraphs a, b, and c of said paragraph 10, stating that they have complied with all requirements of the law of the State of Michigan in relation to the required procedure for the institution of a suit for a refund of taxes; which taxes are based upon an unconstitutional, illegal and wholly void taxing statute and assessment, and that under such circumstances, plaintiffs are not compelled to seek any administrative remedy of whatsoever nature as a condition precedent to the filing of their declaration herein.

Wherefore, plaintiffs pray that they may have judgment against the defendant as prayed in their declaration on file herein.

Dated at Detroit, Michigan, this 12th day of January, A. D., 1953.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation—Plaintiff,

Fred W. Kaess,
United States Attorney,

By: (Sgd.) John L. Owen,
Assistant United States Attorney,

Attorneys for United States of America.

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30 IN CIRCUIT COURT OF WAYNE COUNTY

Pre-Trial Statement—Filed April 14, 1955

Proceedings had before the Honorable Ira W. Jayne, Circuit Judge, in the above entitled cause, on Wednesday, April 13, 1955.

Appearances: Thomas E. Coulter, Esq., appearing on behalf of co-plaintiffs; Julius C. Pliskow, Esq., appearing on behalf of defendant.

This lawsuit involves certain taxes levied by the City of Detroit.

Counsel have cooperated in waiving a jury trial and have prepared an agreed stipulation of facts which is attached hereto and made a part of the pre-trial statement.

While there is a saving clause for additional evidence, they contemplate that no additional evidence will be necessary excepting the formal marking of certain ordinances, resolutions, and so forth.

They request that the case be assigned to a Judge for preliminary discussion before presentation of formal briefs, and it is so ordered.

(Sgd.) Ira W. Jayne,
Circuit Judge.

(The parties hereto executed a written stipulation of facts in the Trial Court, which as noted above, was filed on April 14, 1955 and made a part of the above pre-trial statement. The said stipulation of facts together with the testimony taken at the trial of said cause constituted the facts upon which the opinion and judgment of
31 the Trial Court was made. Inasmuch as all of the facts stipulated to in said written stipulation are contained in the agreed statement of facts constituting the settled record, the contents of such stipulation are not made a part of this record.)

IN CIRCUIT COURT OF WAYNE COUNTY

Motion for New Trial—Filed September 12, 1955

Now come the above named co-plaintiffs, United States of America, by its attorneys, Fred. W. Kaess, United States Attorney, and John L. Owen, Assistant United States Attorney, on behalf of and at the direction of the Attorney General of the United States of America, and Borg-Warner Corporation, (Detroit Gear Division), an Illinois corporation, by its attorney, Glenn M. Coulter, and move this Court for an order setting aside the judgment of no cause of action entered in said cause on the 25th day of August, A. D., 1955, and granting a new trial therein, for the following reasons:

1. Because such judgment is based upon a written opinion of this Court dated August 23, 1955, which opinion and the findings of the Court therein contained are contrary to the law and to the decisions of the Supreme Court of the United States of America, and because the decisions relied upon by the Court in said opinion do not support the conclusions therein expressed.

2. Because said judgment and written opinion of the Court uphold the validity of an illegal and unconstitutional taxing statute which attempts to subject the United States of America and its properties, and lessees of its properties, to unlawful and discriminatory taxation.

32 3. Because said judgment and written opinion of the Court uphold the validity of an illegal and un-

constitutional tax assessed against real property owned by the United States, which property is exempt and constitutionally immune from taxation by the City of Detroit.

4. Because the judgment of no cause of action rendered in favor of defendant results in a miscarriage of justice as against plaintiffs herein, for the reasons above stated.

This motion is based upon the files and records in this cause, the affidavit of John L. Owen attached hereto, and upon the brief of arguments and law relied upon by plaintiffs in support of their contention as to the merits of the within cause, which brief is filed with the Court simultaneously herewith.

The Court is hereby respectfully requested to file reasons in writing in case said new trial is denied.

Dated at Detroit, Michigan this 12th day of September, A. D., 1955.

/s/ Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation, Plaintiff,

/s/ Fred W. Kaess,
United States Attorney,

/s/ John L. Owen,
Assistant United States Attorney,
Attorneys for United States of America.

33 **Affidavit in Support of Motion for New Trial**

State of Michigan,
County of Wayne—ss.

John L. Owen, being first duly sworn, deposes and says he is an Assistant United States Attorney, and that by and under the direction of the Attorney General of the United States of America, he is one of the attorneys representing the United States of America in the within cause.

Deponent further says that the attached motion for new trial should be granted for the reason that the within cause presents questions of extreme public importance

both to the State of Michigan, and its local sub-divisions having taxing authority, as well as to the United States of America, and because the judgment of this Court of no cause of action in favor of defendant herein dated August 25, 1955, sustains the validity of a statute of the State of Michigan, which he verily believes is clearly unconstitutional, invalid and unlawful and which discriminates against the United States of America and lessees of its properties.

Deponent further says that plaintiffs have filed simultaneously herewith their complete brief of the law in support of their arguments on which they rely in attacking the constitutionality and validity of said statute of the State of Michigan here in question and of the assessment based upon said statute here under dispute, and that the extreme importance of the within cause to the public
34 requires that this Court reconsider said issues upon a study of said brief.

Further deponent sayeth not.

/s/ John L. Owen.

On this 12th day of September, A. D., 1955, before me personally appeared John L. Owen, to me known, who under oath said that he has read the foregoing affidavit by him subscribed, that he knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated to be upon information and belief, and as to those matters, he believes them to be true.

/s/ Dwight K. Hamborsky,
Notary Public, Wayne County, Michigan.
My commission expires: March 31, 1956.

IN CIRCUIT COURT OF WAYNE COUNTY

Response to Motion for New Trial—Filed September 16, 1955

Comes now the City of Detroit, a municipal corporation, made defendant in the above entitled cause, and by way of response to the motion heretofore filed by and on behalf of the plaintiffs therein, says:

1. It is denied that the judgment entered in said action based upon the written opinion of this Court or said opinion or findings are contrary to law or to the decisions of the Supreme Court of the United States; likewise it is denied that the decisions relied upon by the Court in said opinion do not support the conclusions therein expressed.

35 2. It is denied that the judgment and written opinion of this Court in effect subject the United States of America or its properties, or lessees thereof, to unlawful and discriminatory taxation.

3. It is denied that said judgment and written opinion of the Court in effect uphold a tax against real property owned by the United States.

4. It is denied that the judgment entered herein results in a miscarriage of justice against plaintiffs.

5. It is respectfully submitted that the motion for new trial should be denied by this Court for the reasons stated in its opinion dated August 23, 1955 upholding the validity of Act 189 of the Public Acts of Michigan, 1953.

/s/ Paul T. Dwyer,
Corporation Counsel,

Bert R. Sogge,
Julius C. Pliskow,
Assistants Corporation Counsel,

By /s/ Julius C. Pliskow;
Assistant Corporation Counsel,

Attorneys for Defendant,
1010 City-County Building,
400 Woodward Avenue,
Detroit 26, Michigan.

Dated: September 16, 1955.

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36 IN CIRCUIT COURT OF WAYNE COUNTY

Settled Record (Consisting of Stipulated Statement of Facts)

1. Plaintiff, Borg-Warner Corporation, an Illinois corporation, is a lessee of a portion of real property located

at 11111 French Road, Detroit, Michigan, under a five year lease with the United States of America, as Lessor, and Borg-Warner Corporation, as Lessee, dated August 14, 1950, but effective as of March 8, 1948, which lease was amended by a written amendment executed on March 3, 1954, but dated as of December 1, 1952.

At the trial of this cause before Hon. Herman Dehnke on April 28, 1955, testimony was confined to identification and introduction of exhibits, at which time a copy of said lease and the written amendment thereto were received in evidence under stipulation of the parties that the same constituted true copies of such original documents. Said exhibits were respectively marked "Exhibits 'A' and 'B'" of co-plaintiffs herein, and by further stipulation of the parties hereto, such photostatic copies are transmitted directly to the Supreme Court as permitted by Rule 63.

The following is a condensation and analysis of said lease and written amendment thereto:

Lease: NOy (R)—60040:—

Parties: United States of America, Borg-Warner Corporation, Organized under law of Illinois, 310 S. Michigan Avenue, Chicago 4.

Subject Property: Naval Industrial Reserve Plant, 11111 French Road, Detroit, facilities but not excepted area.

Reason for Leasing: Not, for the time being, required for public use—Standby facility against a national emergency.

Authority: Act of Congress, Aug. 5, 1947 (61 Stat. 774, 34 U. S. C., Sec. 522a) Approved as required by Act of Congress, April 4, 1944. (58 Stat. 189, 190).

Term: Five years from March 8, 1948 to and ending on March 7, 1953 with option to extend for 3 additional terms of 5 years each. Executed Aug. 7, 1950. (Letter of intent dated March 8, 1948 is terminated).

Rent: To pay $20,400.00 for first year. $2,400.00 for each lease year thereafter plus 5½¢ per sq. ft. for space added to manufacturing area by removal of government owned materials.

Maintenance: Obligation of Borg-Warner to certain maximum amounts to be expended each year.

Insurance Risk: Obligation of Borg-Warner including property damage and third party bodily injury and property damage.

Termination Privileges by Government:

(a) Upon declaration of national emergency, by President or Congress.

(b) Upon 120 days' notice by Secretary of Navy in interests of national defense.

(c) Upon offer to sell as surplus and tenant's notice it does not desire to exercise option.

(d) Following 120 days' notice in event Borg-Warner defaults in terms of lease, except where beyond its control.

38 Taxation: In event Congress acts to permit state and local taxes imposed on other than Borg-Warner's possessory interest then lease to be renegotiated.

Liens: Borg-Warner not to do or suffer anything to be done which would subject facilities to any liens.

FIRST AMENDMENT TO LEASE NOy (R)—60040

Parties: Same.

Subject Property: Same.

Reason for Amendment: Election to extend for 5 years to March 7, 1958.

Authority: Same as above.

Term: Five years to March 7, 1958 with two additional terms of 5 years each. Executed February 23, 1954 and March 3, 1954, respectively, by parties as of December 1, 1952.

Added Terms: Tenant to heat space retained by government at its own cost and expense.

Rent: Tenant to pay an additional cash rent of $44,966.64 representing unexpended portion of maximum amount

to be expended for maintenance, $24,000 per annum in advance for year March 8, 1953—March 7, 1954 and thereafter semi-annually plus additional rent at 70¢ per sq. ft. per annum for space added to manufacturing area.

Rent Proviso Taxes: Effective March 8, 1954 through term of lease, tenant to deduct and pay from stipulated semi-annual installments any taxes assessed against it under provisions of Act 189, P. A. 1953 or other taxation statutes which attempt to tax Borg-Warner on the basis of assessed value of facilities leased to it or on the basis of the value of its lease-
39 hold interest or for any other reason because of its use and occupancy under this lease.

Borg-Warner to repay any taxes refunded and to cooperate with Government including payment of such taxes under protest, if so required by Government.

Maximum Maintenance: Amended to $35,000.00.

Otherwise, all other terms and conditions of original lease contract to remain in full force and effect.

2. The portion of said premises leased by Borg-Warner Corporation consists of a portion of an industrial plant, building and grounds, located on said premises. Such portion of said premises are used exclusively by Borg-Warner Corporation for manufacturing purposes in its business conducted for profit.

3. The United States of America is the present owner in fee simple of said real property at 11111 French Road, Detroit, Michigan, and has been the sole owner thereof prior to and since January 1, 1954. Borg-Warner Corporation's sole interest in said real property is that of a lessee as aforedescribed.

4. Borg-Warner Corporation was, as of January 1, 1954, assessed by the Board of Assessors of the City of Detroit for a tax levied under the provisions of Act 189 of Public Acts of 1953 of the State of Michigan, (C. L. 1948 Supp., 211.181 and 211.182), which Act reads as follows:

40 **Taxation of Lessees and Users of Tax-Exempt Real Property**

Act 189, 1953, p. 252; imd. eff. June 10 (##7.7 (5), 7.7 (6)).

AN ACT to provide for the taxation of lessees and users of tax exempt property.

The People of the State of Michigan Enact:

Section 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private, individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fairground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

Section 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owenrs of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverible by direct action of assumpsit.

41 Pursuant to said Act, the Board of Assessors valued as of that date the real property at 11111 French Road, Detroit, Michigan, occupied by Borg-Warner Corporation, precisely as it would have done had such real property been owned in fee simple and occupied by Borg-Warner Corporation. It valued such property at the true cash value of the fee simple ownership of that portion of said plant site under lease, on the basis defined in Michi-

gan Statutes Annotated, Section 7.27, (C. L. 1948, Sec. 211.27) which states:

> The words "cash value," whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. In determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, quantity and value of standing timber, water power and privileges, mines, minerals, quarries or other valuable deposits known to be available therein and their value. (C. L. 1948, # 214.27; C. L. 1929, # 3415; C. L. 1915, # 4021; C. L. 1907, # 3850),

giving consideration to the advantages and disadvantages enumerated in such section.

Said valuation concerned itself solely with that portion of said premises leased by Borg-Warner Corporation.

The valuation of the leased real estate thus determined was in the amount of $352,060.00 and such valuation was accordingly set down upon the personal property tax rolls of the City of Detroit opposite the description of the
42 parcel to which it pertained, and a tax bill was thereafter issued by the Treasurer of the City of Detroit to Borg-Warner Corporation. A photostatic copy of the City of Detroit Property Tax Assessment Roll dealing with the property at 11111 French Road, Detroit, Michigan, was received in evidence as Defendant's Exhibit 2. By stipulation of the said parties, the said Exhibit 2 of defendant is being transmitted directly to the Supreme Court. A witness of defendant testifying in relation to said assessment roll, gave testimony as to the owner and lessee of each of the four parcels shown on said exhibit, testifying that the owners of each were the United States of America or a municipal corporation of the State of Michigan.

The portion of the real property occupied by Borg-Warner Corporation on said premises was not assessed to Borg-Warner Corporation pursuant to Michigan Stat-

of suit, Borg-Warner Corporation had not protested the validity of said assessment of tax through the Common Council of the City of Detroit or any administrative tribunal or agency of the City of Detroit or the State of Michigan.

10. It was stipulated between the parties to this cause that the charter provisions, ordinances and resolutions of the Common Council of the City of Detroit applicable to and covering the within matters are to be considered as a part of the record of this cause, and could be referred to by either party without being introduced formally in evidence. Defendant attached Ordinance 375-E of the City of Detroit to its answer as Exhibit 1. It relied on the provisions thereof as the basis for its special defense pointing to failure of Borg-Warner Corporation to pursue prescribed administrative remedies prior to instituting suit.

11. On August 25, 1955, subsequent to the trial of said cause, and pursuant to a written opinion of the Trial Judge, a judgment was entered for no cause of action in favor of defendant, City of Detroit. On September 16, 1955, the Trial Judge denied a motion for new trial filed by plaintiffs and appellants herein, and on September 21, 1955, an order was entered denying said motion for new trial. No written opinion was filed by the Circuit Judge in relation to said motion for new trial, but a transcript of the proceedings at such hearing is as follows:

Transcript of Proceedings of Hearing on Motion for New Trial

Proceedings had upon the above-entitled cause, taken before the Honorable Herman Dehnke, Circuit Judge, (visiting), at Detroit, Michigan, on Friday, September 16, 1955.

Appearances: Mr. Lyle M. Turner, United States Department of Justice, Washington, D. C.; Mr. John L. Owen, Assistant United States Attorney, Detroit, Michigan; Mr. Thomas E. Coulter, 1703 Ford Building, Detroit 26, Michigan, representing Borg-Warner Corporation; Mr. Julius C. Pliskow, Assistant Corporation Counsel, City of Detroit, Michigan.

45 Detroit, Michigan,
Friday, September 16, 1955
About 2 o'clock P. M.

Mr. Coulter: This is a motion for a new trial. On behalf of the co-plaintiffs, The United States of America, and Borg-Warner Corporation, Mr. Lyle M. Turner, an attorney with the Department of Justice in Washington, counsel here for the United States of America, is here to argue this motion on behalf of the plaintiffs.

I would like to present Mr. Turner to the Court at this time.

The Court: Well, I am just wondering, gentlemen, whether you have anything to present that is not included in the brief which ou filed in the case, and of which I have had a copy for several days?

Mr. Pliskow: May I submit a response to the motion for a new trial, for the record, Your Honor?

The Court: You are filing an answer?

Mr. Pliskow: Yes, sir.

The Court: All right. I was just wondering whether you had anything more to present than is included in that brief?

Mr. Turner: We have nothing more in substance, Your Honor, to present.

The Court: Well, I think I should say this then. Ordinarily I am more than glad to hear from counsel in argument of a case. I think perhaps the reason for the filing of this motion is that I overlooked stating in my opinion that although the plaintiffs had not furnished me with a brief in this case, I had had the benefit of very complete and exhaustive briefs
46 in two cases in Muskegon County; in one of which at least the issues, as I see it, were substantially identical with those in this case.

I have gone over this brief sufficiently to satisfy myself that there is nothing in the motion, and in the briefs, which was not covered in those briefs; and I do not think any cases are cited in this brief which were not cited in those.

I say that merely to eliminate any supposition that might have existed that I had made a decision with-

out going into these cases. While I do not have my memorandum with me, I am sure I spent at least three full days in studying those cases. You will recall, Mr. Coulter I think, that there was some correspondence between myself and Mr. Street of Muskegon?

Mr. Coulter: Yes, sir. You sent me copies, Your Honor.

The Court: He had learned somehow that this case had been assigned to me, and asked permission to file those briefs. I told him I thought that would be proper as long as he notified counsel on the other side that that was being done.

So, I am frank to say that I make no claim to infallibility, and I could be mistaken of course, but that decision was rendered after careful study of all these cases, including those that are mentioned in plaintiffs' briefs now before the Court.

For that reason I think we might just as well face the situation. There is nothing to be gained by pursuing the motion for a new trial. In the interest of all parties concerned, the sooner the case gets to the Supreme Court, the better.

47 That is the reason why I inquired whether the plaintiffs had anything further to present than their brief covered. They having stated that they do not, I think it is in order to deny the motion for a new trial, and then you can be on your way.

Mr. Pliskow: I had no idea that Your Honor was familiar with the matters in the Muskegon cases.

The Court: They are very good briefs, the same as this one which has just recently been furnished by the Government and the Borg-Warner Corporation, on their behalf. But, as I say, I have gone over that ground thoroughly, and right or wrong, those are my conclusions.

(Which were all of the proceedings had upon the above-entitled cause.)

IN CIRCUIT COURT OF WAYNE COUNTY

Opinion—August 23, 1955

(File Endorsement Omitted)

This is an action to recover a tax of $6,161.75 paid under protest. The case was submitted, principally on an agreed statement of facts, on April 28th last, on principal briefs to be furnished within 30 days; and reply briefs 15 days later. Defendant's brief was furnished to the Court more than two months ago, but none has been received from plaintiffs, although last promised for not later than August 20th. Under the circumstances the Court does not feel justified in delaying decision further, especially since the reasoning of defendant's brief, and the cases cited in support thereof, seem determinative of the issues.

48 The assessment in question was made under authority of Act 189, P. A. 1953, being C. L. 1948 Supp. 211.181-2, against plaintiff Borg-Warner, lessee of the owner, plaintiff United States. Plaintiffs claim the statute to be unconstitutional as an indirect attempt to tax property of the United States. Defendant denies this claim, and also moves that the action be dismissed because plaintiffs have not exhausted their administrative remedies under state and city laws. Defendant has indicated, however, that while it is not waiving this point, it would prefer to have decision rested on the fundamental issue of the validity of the tax.

The assessment in question was measured by the valuation of that portion of improved real property at 11111 French Road in Detroit which was occupied by Borg-Warner and used by it exclusively for manufacturing purposes in its business conducted for profit, its interest being that of a lessee.

The lease was dated August 14, 1950, effective as of March 8, 1948. By amendment dated March 3, 1954, dated as of December 1, 1952, the lease was extended for a further term of five years from March 8, 1953, at an increased rental, and permitting Borg-Warner to take credit for any taxes assessed against it under the Act in question. In this manner, the "economic burden" of the tax is claimed to be placed on the United States. Defend-

ant takes the position that the statute authorizes a non-discriminatory tax which is not in violation of the constitutional principles mentioned.

The material portions of Act 189 provide:

> "When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, * * *
> shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner * * *."
>
> "Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property."

It is true that in the first provision quoted, the meaning is not completely clear, obviously because, in the process of going through the legislation "mill" the words "the lessee or user of such property" were accidentally dropped in recopying, instead of appearing just before the words "shall be subject to taxation" after the asterisks above. The meaning and purpose is nevertheless clear from the enactment as a whole.

It would serve no necessary purpose to analyze and quote from the decisions which I consider controlling and determinative of the issues upon which the case turns. In my opinion they justify the following conclusions:

The "incidence" of the tax falls not upon the United States, but upon plaintiff Borg-Warner, and the tax is not invalid because indirectly the "economic burden" falls upon the United States; the tax is not one upon the real estate, but upon the user; the tax is not discriminatory; it does not adversely affect any "sovereign power"; it creates no liability against the United States or any of its agencies or instrumentalities.

Some of the authorities supporting these conclusions are:

Federal Reserve Bank v. Revenue Department, 339 Mich. 587;

National Bank of Detroit v. Department of Revenue, 340 Mich. 573 (Appeal dismissed in U. S. Supreme Court May 23, 1955);
In re Fish's Estate, 219 Mich. 369;
Oklahoma Tax Com. v. Texas Co., 336 U.S. 342;
Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 78 L. Ed. 622;
Colorado Nat. Bank v. Bedford, 310 U.S. 11, 84 L. Ed. 1067;
Annotation 23 A. L. R. 248;
Union Trust Co. v. Probate Judge, 125 Mich. 487;
Federal Land Bank v. Bismarck, 314 U. S. 95, 86 L. Ed. 65;
Esso Standard Oil Co. v. Evans, 345 U. S. 495, 97 L. Ed. 1174.

It follows that the tax is valid, and defendant is entitled to a judgment of no cause of action, with costs to be taxed.

I am also of the opinion that in any event, the motion to dismiss on the ground that plaintiffs have not exhausted their administrative remedies before bringing this suit is supported by the authorities. However, if the decision on the issue of validity is correct, it is not necessary to be further concerned about this point.

/s/ Herman Dehnke,
Circuit Judge, presiding by assignment.

Dated: August 23, 1955.

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51 IN CIRCUIT COURT OF WAYNE COUNTY

Judgment—Filed August 25, 1955

At a session of the Circuit Court for the County of Wayne held at the Court House, in the City of Detroit, on the 25th day of August, 1955, Honorable Herman Dehnke, Circuit Judge.

The parties being again present, the Court heard the conclusion of the testimony, the arguments of counsel and finds that the defendants did not undertake and promise as the plaintiffs have complained against them.

Therefore, it is adjudged that the plaintiffs take nothing by their suit and that the defendants recover their costs to be taxed, and have execution therefor.

/s/ Herman Dehnke,
Circuit Judge.

IN CIRCUIT COURT OF WAYNE COUNTY

Notice of Entry of Judgment—Filed August 25, 1955

To: Glenn M. Coulter,

Address: 1703 Ford Building,
Attorney for Plaintiff.

Please take notice that a judgment for no cause of action in the above entitled cause was this day entered in favor of the defendant and against the plaintiff with costs to be taxed.

Edgar M. Branigin, Clerk,
Dan I. Sejcik,
Deputy Circuit Court Clerk.

Date: .....

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52 IN CIRCUIT COURT OF WAYNE COUNTY

Order Denying Motion for New Trial—Filed September 21, 1955

At a session of said Court held at and in the City-County Building in the City of Detroit, Michigan, on the 21st day of September, 1955.

Present: Honorable Herman Dehnke, Circuit Judge, 23rd Judicial Circuit, presiding in Wayne County.

There having come on before me the matter of the motion for new trial presented by the co-plaintiffs above named, and respective counsel for all parties having appeared in open Court on the date fixed for hearing, and the Court having considered the matters raised in the brief in support thereof filed by the moving parties and being fully advised in the premises, now, therefore

It is ordered that the motion for new trial herein be and the same is hereby denied.

Herman Dehnke,
Circuit Judge, 23rd Judicial Circuit, presiding in Wayne County.

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53 IN CIRCUIT COURT OF WAYNE COUNTY

Certificate of Circuit Judge—Filed October 6, 1955

I, Herman Dehnke, Circuit Judge of the Twenty-Third Judicial District, and acting by assignment in the Third Judicial District as Circuit Judge, upon the hearing of the above case, do hereby certify that said action is one at law, was submitted to the Court on the facts, that a judgment was rendered for the defendant, and that the controversy actually involves more than five hundred ($500.00) dollars."

Dated, September 29, 1955.

(Sgd.) Herman Dehnke
Circuit Judge.

IN CIRCUIT COURT OF WAYNE COUNTY

Stipulation Re Exhibits—Filed November 10, 1955

It is hereby stipulated by and between the parties to this cause, under the provisions of Michigan Court Rule 66 (Section 11) that this Court may enter an order directing the Clerk of the Circuit Court for the County of Wayne to transmit directly to the Supreme Court of Michigan for its use in determining the within appeal the following described documents, heretofore received in evidence on the trial of said cause, to wit:

1. Co-plaintiffs Exhibit "A"—photostatic copy of lease NOy (R)—60040, dated March 8, 1948, executed by and between the United States of America, as Lessor, and Borg-Warner Corporation as Lessee.

54 2. Co-plaintiffs Exhibit "B"—first amendment to lease NOy (R)—60040, dated December 1, 1952.

3. Defendants Exhibit "2"—photostatic copy of City of Detroit Personal Property Tax Roll covering premises at 11111 French Road, Detroit, Michigan, for the year 1954.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, Co-plaintiff and Co-appellant,
1703 Ford Building,
Detroit 26, Michigan.

(Sgd.) Fred W. Kaess,
United States Attorney,

(Sgd.) John L. Owen,
Assistant United States Attorney;
Attorneys for United States of America Co-plaintiff and Co-appellant.
869 Federal Building,
Detroit 31, Michigan.

(Sgd.) Julius C. Pliskow,
Attorney for City of Detroit, a Michigan Municipal Corporation,
Defendant and Appellee,
601 City-County Building,
Detroit 26, Michigan.

Dated: November 10, 1955.

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55 IN CIRCUIT COURT OF WAYNE COUNTY

Order Transmitting Exhibits—November 10, 1955

(File Endorsement Omitted)

At a session of said Court held at and in the City-County Building in the City of Detroit, Michigan, on the 10th day of November, A. D., 1955.

Present: Honorable Ira W. Jayne, Circuit Judge.

On reading and filing the attached stipulation of the parties hereto and the Court being of the opinion that the

expense and difficulty of copying the documents described in said stipulation is sufficient to justify the within order, and the Court being advised in the premises;

It is hereby ordered that the Clerk of this Court be and he is hereby directed to transmit the following described exhibits received in evidence on the trial in this cause directly to the Supreme Court of Michigan for use in determining the within appeal, in lieu of the same being copied and incorporated in the printed record on appeal, to-wit:

1. Co-plaintiffs Exhibit "A"—photostatic copy of lease NOy (R)—60040 dated March 8, 1948, executed by and between the United States of America, as Lessor, and Borg-Warner Corporation as Lessee.

2. Co-plaintiffs Exhibit "B"—first amendment to lease NOy (R)—60040, dated December 1, 1952.

3. Defendants Exhibit "2"—photostatic copy of City of Detroit Personal Property Tax Roll covering premises at 11111 French Road, Detroit, Michigan, for the year 1954.

(Sgd.) I. A. W. Jayne,
Circuit Judge.

Dated: November 10, 1955.

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56 IN CIRCUIT COURT OF WAYNE COUNTY

Claim of Appeal to the Supreme Court of Michigan—Filed October 6, 1955

United States of America and Borg-Warner Corporation (Detroit Gear Division), and Illinois corporation, co-plaintiffs, claim an appeal from the judgment entered on the 25th day of August, A. D. 1955, and from order denying motion for new trial filed herein by co-plaintiffs entered on the 21st day of September, 1955, by the Circuit Court for the County of Wayne. Co-appellants take a general appeal.

Dated at Detroit, Michigan, this 6th day of October, A. D., 1955.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, Co-plaintiff and Co-appellant,
(Sgd.) Fred W. Kaess,
United States Attorney,
(Sgd.) Orrin C. Jones,
Assistant United States Attorney,
Attorneys for United States of America Co-plaintiff and Co-appellant.

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57 IN CIRCUIT COURT OF WAYNE COUNTY

Statement of Reasons and Grounds for Appeal—Filed November 16, 1955

Each appellant, for itself, claims the following reasons and grounds for appeal:

(1) The Court erred in entering a judgment of no cause of action.

(2) The Court erred in holding that Act No. 189 of the Public Acts of Michigan for 1953, as here applied, was not repugnant to the Constitution of the United States and invalid as imposing a tax upon property of the United States which is immune from taxation by any state or its subdivision.

(3) The Court erred in holding that Act 189 was not an ad valorem tax upon property owned by the United States and invalid, but was a valid specific tax upon the lessees or users of otherwise tax-immune property.

(4) The Court erred in not holding that Act 189 is unconstitutional as attempting indirectly to impose a tax upon property, or interests in property, owned by the United States, by the mere device of stating that it is taxing the lessees or users thereof to the same extent and in the same manner as though such lessee or users, and not the United States, were the owner of such property.

(5) The Court erred in not holding that, if Act 189 may be construed as imposing a privilege tax upon the lessee

or user of immune property, it is invalid because it is discriminatory in its purpose and effect. It is not imposed upon all lessees or users of real property but
58 is primarily directed at users of federally-owned property for the purpose of collecting from them the taxes which the State under the Federal Constitution cannot assert against or collect from the United States with respect to its property.

(6) The Court erred in not holding that, if Act 189 may be construed as imposing a privilege tax, it is invalid as here applied for it would impose a tax for the privilege of using federal property placed in the possession of the user under the terms of a federal statute designed and enacted to accomplish a federal purpose. The exercise of this constitutional right of the Congress to dispose of and make all needful rules and regulations respecting the property belonging to the United States may not be made the subject of a privilege tax by any state and Act 189 constitutes a direct interference with the exercise of this federal function.

(7) The Court erred in not holding that Act 189 is limited in application solely to properties which are within the power of the State to tax but which have been made tax exempt by the State as a matter of legislative grace, and is not applicable to property which, absent express Congressional consent, is immune from state taxation by virtue of the Federal Constitution.

(8) The Court erred in holding that Act 189, as here applied, is valid, notwithstanding that the United States has exercised its powers of legislation with respect to the property in question in such a manner as to provide that the state may tax to the extent of the value of the lessee's interest but not in the same amount and to the same extent as though the lessee or user were the owner of the property. Act 189 is in conflict with the federal
59 legislation and inoperative for the federal legislation under the Constitution of the United States is exclusive in its application.

(9) The Court erred in not holding that Act 189 is invalid as being repugnant to the Constitution of the United States in that it violates the due process and equal protec-

tion clause of the Fourteenth Amendment to such Constitution by taxing to the appellant, Borg-Warner property or the value of property which it does not own but which the Act conclusively presumes it does own.

(10) The Court erred in not holding that, under the Michigan Constitution, Act 189, if it imposes an ad valorem tax taxable to the lessee or user, is invalid because it provides for an assessment of the interest of such lessee or user, not based upon the true value of his leasehold interest but upon the entire fee simple interest of the owner, and therefore is violative of Article X, Section 7, of such Constitution which requires that such interest be assessed at its true cash value.

(11) The Court erred in holding that the motion to dismiss, based upon the claim that the appellants did not exhaust their administrative remedies before bringing suit, is supported by the authorities where the tax was paid under protest and an action in assumpsit timely brought to recover the tax based upon the invalidity of the statute and complete absence of power on the part of the appellant to assert the tax.

(12) The Court erred in not granting the motion for new trial filed herein by appellants, for each and all of the reasons hereinbefore set forth.

60 And, for the errors aforesaid, each appellant, for itself, says that the judgment entered in the above cause should be reversed, vacated and held for naught.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, Co-plaintiff and Co-appellant.
(Sgd.) Fred W. Kaess,
United States Attorney,
(Sgd.) John L. Owen,
Assistant United States Attorney,
Attorneys for United States of America Co-plaintiff and Co-appellant.

Dated: November 10, 1955.

61 IN CIRCUIT COURT OF WAYNE COUNTY

Certificate of Circuit Judge—Filed November 10, 1955

I, Ira W. Jayne, Circuit Judge of the Third Judicial District of Michigan, acting for and on behalf of Herman Dehnke, Circuit Judge of the Twenty-Third Judicial District of Michigan, before whom said cause was tried, and acting herein with the consent of counsel for the parties to this cause, do hereby certify that the foregoing agreed statement of facts is a true settlement of the facts made by the parties hereto through their respective attorneys of record; that the foregoing was duly settled by me on November 10, 1955, within the time allowed by law and in pursuance of an order entered in said cause extending the time to settle the bill of exceptions herein to and including November 11, 1955; that the foregoing constitutes a true record of the trial proceedings in said cause upon which the Court's opinion set forth herein and whose judgment is now being appealed was based; and that the reasons and grounds for appeal were annexed to said agreed statement of facts at the time the same was certified by me.

Ira W. Jayne,
Circuit Judge.

Dated: November 10, 1955.

Approved as to form and content:

Paul T. Dwyer,
Corporation Counsel,

By: (Sgd.) Julius C. Pliskow,
Assistant Corporation Counsel.

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63 IN SUPREME COURT OF STATE OF MICHIGAN.

UNITED STATES OF AMERICA and BORG-WARNER CORPORATION (Detroit Gear Division), an Illinois corporation,
Co-Plaintiffs and Co-Appellants

v.

CITY OF DETROIT, a municipal corporation,
Defendant and Appellee

Before the Entire Bench.

Opinion—May 14, 1956

DETHMERS, C.J.

The United States owns real estate consisting of an industrial plant, building and grounds in Detroit. A portion of it is leased to plaintiff Borg-Warner Corporation, which uses it exclusively for manufacturing purposes in its business conducted for profit. The lease provides that Borg-Warner may deduct from rent to United States any taxes assessed against and paid by Borg-Warner under PA 1953, No. 189 (CLS 1954, §§ 211.181, 211.182 [Stat Ann 1955 Cum Supp §§ 7.7(5), 7.7(6)]), by reason of its use of the premises, that it will cooperate with United States to contest validity of such taxes and pay same under protest, if required by United States, and that it will repay United States any such taxes refunded.

Act No. 189 reads:

"AN ACT to provide for the taxation of lessees and users of tax-exempt property.

"*The People of the State of Michigan enact:*

"211.181 Taxation of lessees and users of tax-exempt property; exception. [M.S.A. 7.7(5)]

"SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

"211.182 Assessment and collection; action of assumpsit. [M.S.A. 7.7(6)]

tional as constituting imposition of a tax on immune property of United States. The court said, *inter alia:*

"It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. * * * This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

"The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: 'The following *subjects and property* shall . . . be valued and assessed, and *subject to taxation.*' Taxes are 'declared to be a *first lien on said property.*' (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

"The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. * * *

"We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States. * * *

"Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * *

"We think, however, that the Government's property interests are not taxable either to it or to its bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its

behalf and for its purposes. He may be an officer, an agent, or a contractor. *His personal advantages from the relationship by way of* salary, profit or *beneficial personal use of the property may be taxed as we have held.* But neither he nor the Government can be taxed for the Government's property interest." (Emphasis supplied.)

We agree with defendant that Allegheny is distinguishable from the instant case in controlling respects. To begin with, the hiatus in Section 1 of Act 189, resulting from failure to express the subject of the predicate "shall be subject to taxation", which had been expressed in the bill as passed in the House, was apparently occasioned by inadvertent omission in the Senate. That subject was clearly intended to be, as in the House draft, "the lessee or user of such property." This is evident from the title of the act as well as from Section 2, which provides that the taxes shall be assessed to the lessees or users of real property. Thus, the Michigan act provides that it is the users of tax-exempt property who shall be subject to taxation, as contrasted with the Pennsylvania act considered in Allegheny, which provided that certain property should be subject to taxation. In further contrast with Allegheny, and stated in the converse of the language therein, the tax at bar is a form of personal taxation and not a tax against the property as a thing—its procedures are more analogous to procedures *in personam* than *in rem*—the power
67 to tax is not predicated upon jurisdiction of the property, but upon jurisdiction of the user—the property is not the subject of the tax and does not stand as security for its payment. These distinctions between Allegheny and the case at bar we think go to the roots of the problem of the nature of the taxes in the two cases and leave the holding in Allegheny that the tax there was on United States property without application here.

In Educational Films Corp. v. Ward, 282 US 379, the court upheld a New York franchise tax on certain classes of domestic corporations, payable each year in advance and measured by the corporation's entire net income of the preceding year, which, in the case of plaintiff therein, was derived in part as royalties from copyrights granted by the United States. The court held that, assuming Federal

copyrights and income therefrom to be immune from State taxation as instrumentalities of the Federal government, the franchise tax in question insofar as measured by royalties from copyrights was not void as a tax on Federal instrumentalities. In so holding the court said:

"If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise."

Applying the test of the quoted language here, it is plain that Act 189 can have no application independent of Borg-Warner's enjoyment of the privilege of using the real estate in connection with its business conducted for
68 profit, and that the tax is, therefore, not an *ad valorem* tax on real property of United States and void accordingly, but a specific tax on Borg-Warner's privilege of using it and, hence, valid. This squares with the above quoted language from Allegheny to the effect that Mesta enjoyed a right of possession which the court seemed to suggest, without deciding, could be taxed by the State, and the further statement that it had theretofore held that a contractor's personal advantages from the beneficial personal use of United States property may be taxed by a State. That the economic burden of the tax, as distinguished from its legal incidence, happens to fall on United States is no barrier to its validity. James v. Dravo Contracting Co., 302 US 134; Alabama v. King & Boozer, 314 US 1; Esso Standard Oil Co. v. Evans, 345 US 495.

Plaintiffs say, however, that even if Act 189 stated in express terms that it was imposing a specific tax on the privilege of using the immune United States property, still it would be unconstitutional because the full value of the

property is used as the measure in assessing the tax, thus evidencing a legislative intent to accomplish indirectly what may not be done directly, namely, to tax property of the United States. In this connection they cite Pittman v. Home Owners' Loan Corp., 308 US 21; Federal Land Bank v. Crosland, 261 US 374; New Jersey Insurance Co. v. Division of Tax Appeals, 338 US 665; Missouri v. Gehner, 281 US 313. Plaintiffs say that, however phrased, the act is, in fact, aimed at and intended to reach the property of United States in a manner held invalid in Macallen Co. v. Massachusetts, 279 US 620, and Miller v. Milwaukee, 272 US 713. We come, then, to the same position confronted by the court in Educational 69 Films Corp. v. Ward, supra, when it said:

"Hence, we pass to the chief objection urged against it, that such a tax, however described, and even though deemed to be a tax on franchises, is invalid so far as it is measured by income derived from a federal instrumentality."

Consider, then, these cases cited by plaintiffs. Involved in the Pittman and Federal Land Bank Cases were State taxes imposed on mortgages owned by Federal instrumentalities. In the New Jersey Insurance Company Case a New Jersey statute was considered which provided for an intangible personal property tax which in that case had been assessed against tax-exempt United States bonds held by a domestic corporation, the court pointing out that the tax was not considered by the New Jersey legislature or taxing authorities as a privilege or franchise tax. Likewise, in Missouri v. Gehner the tax was on net assets of insurance companies, including exempt United States bonds held by them. In Miller v. Milwaukee, the Wisconsin statute involved required a Wisconsin corporation to pay a tax on its income, excepting the portion thereof received from United States bonds. The income was later distributed as dividends to stockholders. The Wisconsin statute taxed the stockholders on such dividends only to the extent that they represented income of the corporation derived from tax-exempt United States bonds. The court held the tax on stockholders to that extent void because it was aimed solely at exempt income from United States bonds. The Macallen Case presented an amendment to a State tax-

ing act which was held invalid because its sole purpose was to reach income from tax-exempt United States bonds. In none of these cases was the object of the tax nor the legislative purpose sought to be served the same as at bar. As defendant in the instant case properly points
70 out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon either by direct payment thereof under lease requirements or by payment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and eliminating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally. It is obvious that each of the cases cited by plaintiffs, as just above considered, is distinguishable from the instant case because in each of them either a local tax was sought to be imposed directly on immune property or income as such, or the sole purpose of the tax act was to reach it indirectly, whereas here, as previously considered, the tax is not on the immune property but on the privilege of using it, and the act imposing it is not aimed at that property but, rather, at removing a discrimination between users of private and of public property. That such a privilege tax is not only permissible, as appears from the Allegheny and Educational Films Cases above considered, but that it is valid even though measured by the full value of the immune property or income is settled by Plummer v. Coler, 178 US 115; Home Insurance Co. v. New York, 134 US 594; Educational Films Corp. v. Ward, supra; Flint v. Stone Tracy Co., 220 US 107; Pacific Co. v. Johnson, 285 US 480. In Plummer a State inheritance tax was upheld even though
71 measured by the full value of tax-exempt United States bonds included in a bequest. In Home Insurance Company the court upheld a corporate franchise tax measured by the corporation's dividends and capital

stock, including the full value of tax-exempt United States securities held by the corporation. In Flint and in Pacific corporate franchise taxes were upheld which were measured by income derived in part from tax-exempt United States securities. In Educational Films Corp. v. Ward, supra, the court upheld a corporate franchise tax measured by immune income from Federal copyrights. In each of these cases the privilege tax was held valid despite use of a measure which included the full value of immune property or income.

Plaintiffs also urge that Act 189 violates Mich Const. 1908, art. 10, § 7, in imposing against a lessee an *ad valorem* tax not based on the cash value of his leasehold but of the entire fee simple interest of the owner. Holding, as we do, that the tax imposed is not *ad valorem* on the property nor on the leasehold, but a specific tax on the privilege of using the property, the mentioned constitutional provision is without application. Shivel v. Kent County Treasurer, 295 Mich 10. See, also, Walcott v. People, 17 Mich 68, and Kitson v. Ann Arbor, 26 Mich 325.

Affirmed, with costs to defendant.

Justice Reid took no part in this decision.

Signed: John R. Dethmers.
Edward M. Sharpe.
Harry F. Kelly.
Eugene F. Black.
Leland W. Carr.
Emerson R. Boyles.
Talbot Smith.

(File Endorsement Omitted

72 IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

EDWARD M. SHARPE,
TALBOT SMITH,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

46702

UNITED STATES OF AMERICA, ET AL., *Plaintiffs and Appellants,*

vs.

CITY OF DETROIT, *Defendant.*

Remittitur—May 14, 1956

The records and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiffs, its costs, to be taxed, and that it have execution therefor.

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74 IN THE SUPREME COURT OF THE STATE OF MICHIGAN

(Title Omitted)

Notice of Appeal—Filed August 9, 1956

75 I. Notice is hereby given that United States of America and Borg-Warner Corporation, Co-Appellants above named, hereby appeal to the Supreme Court

of the United States from the final judgment of the Supreme Court of the State of Michigan affirming the judgment of the Circuit Court of Wayne County of no cause of action, which judgment of the Supreme Court was entered May 14, 1956.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The record as settled by the Circuit Court of Wayne County.

2. Judgment (Remittitur).

3. Opinion.

4. This notice of appeal and proof of service.

76 III. The following questions are presented by this appeal:

1. Act 189 of the Public Acts of Michigan for 1953 (CLS 1954, Sections 211.181, 211.182 [Stat. Ann. 1955 Cum. Supp., Sections 7.7(5), 7.7(6)]), as here applied is repugnant to the Constitution of the United States and invalid. It imposes a tax on property of the United States which, lacking Congressional permission, is immune from taxation by any state or its subdivisions.

2. If Act 189 may be construed as imposing a privilege tax, it is invalid as here applied for it would impose a tax for the privilege of using federal property placed in the possession of the user under the terms of a federal statute designed and enacted to accomplish a federal purpose. The exercise of this constitutional right of the Congress to dispose of and make all needful rules and regulations respecting the property belonging to the United States may not be made the subject of a privilege tax by any state and Act 189 constitutes a direct interference with the exercise of this federal function.

3. The United States by express statute has exercised its powers of legislation with respect to the property in question in such a manner as to provide that the state may tax to the extent of the value of the lessee's interest but not in the same amount and to the same extent as though the lessee or user were the owner of the property. Act 189 which taxes the lessee to the extent of the full value of the property is in conflict with the federal law and invalid.

4. If Act 189 may be construed as imposing a privilege tax on the lessee or user of immune federal property, it is invalid because it is discriminatory in its purpose and effect. It is not imposed on all lessees or users of
77 real property but is primarily directed at federally-owned property for the purpose of collecting from the lessees or users taxes which the State under the federal constitution cannot assert against or collect from the United States or its property.

5. Act 189 violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution by taxing to Co-Appellant, Borg-Warner Corporation, property, or the value of property, which it does not own but which the Act conclusively presumes it does own.

FRED W. KAESS
Fred W. Kaess, *United States Attorney for the Eastern District of Michigan*

JOHN L. OWEN
Assistant United States Attorney

Attorneys for Co-Appellant United States of America.

Coulter & Coulter

By THOMAS E. COULTER
Thomas E. Coulter

Attorneys for Co-Appellant, Borg-Warner Corporation.

78 **Proof of Service (Omitted in Printing)**

79 IN THE SUPREME COURT OF THE STATE OF MICHIGAN

(Title Omitted)

Cross-Designation By Appellee of Additional Matters to Be Included in Record—filed August 22, 1956

TO THE CLERK OF THE SUPREME COURT OF THE STATE OF MICHIGAN:

You are hereby requested, pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, to incorporate into the transcript of record, on the appeal herein, in addition to the portions of the record designated by co-appellants herein in their notice of appeal, the following:

1. Co-Plaintiffs' Exhibit "A"—photostat copy of lease NOy(R)—60040 dated March 8, 1948, executed by and between the United States of America, as Lessor and Borg-Warner Corporation, as lessee.

2. Co-Plaintiffs' Exhibit "B"—first amendment to lease NOy(R)—60040 dated December 1, 1952.

3. Defendant's Exhibit "2"—photostat copy of City of Detroit Personal Property Assessment Roll for 1954 covering premises at 11111 French Road, Detroit, Michigan.

80 4. This Cross-Designation together with Proof of Service.

PAUL T. DWYER,
Corporation Counsel
BERT R. SOGGE
JULIUS C. PLISKOW
ROGER P. O'CONNOR
ANDREW DIMAGGIO
Assistants Corporation Counsel

trial Reserve Plant (hereinafter called NIRP), formerly known as Clayton & Lambert Manufacturing Company, Detroit, Michigan, located at 11111 French Road, Detroit, Michigan; and

WHEREAS, the Secretary of the Navy (hereinafter called Secretary) has determined that the NIRP is not surplus to the needs of the Department within the meaning of the Act of Congress of October 3, 1944 (58 Stat. 765), but is not, for the time being, required for public use; and

WHEREAS, it has been determined that it will be in the public interest to lease the NIRP to Borg-Warner upon the terms and conditions hereinafter set forth; and

WHEREAS, this lease is made under the authority of the Act of Congress of August 5, 1947 (61 Stat. 774; 34 U.S.C. sec. 522a), and the approval of the Armed Services Committees of the Congress thereto has been obtained in accordance with the Act of Congress of April 4, 1944 (58 Stat. 189, 190):

NOW, THEREFORE, in consideration of the premises and of the terms, covenants and conditions hereinafter set forth, the parties hereto do agree as follows:

84. ARTICLE 1. *Leased Property.* The Government does hereby lease, rent and demise to Borg-Warner, and Borg-Warner does hereby hire and rent from the Government the following described property:

All that certain piece or parcel of land situate in the City of Detroit, County of Wayne, and State of Michigan, being parts of Lots Numbered Six, Seven, Eight and Nine of Engel's Subdivision of a portion of Fractional Section Fifteen, Township One South, Range Twelve East, formerly in Hamtramck Township, according to the plat thereof recorded in Liber 11 of Plats, Page 73, of the records of said Wayne County, bounded and described as follows, to wit:

BEGINNING at a point within the lines of French Road (eighty-six feet wide) at the intersection of the original center line of said French Road (formerly sixty-six feet wide) with the southeasterly line of said Engel's Subdivision;

extending thence South sixty-three degrees thirty-eight minutes thirty seconds West along said southeasterly line of Engel's Subdivision, on a line partly crossing said French Road and partly within the lines of Madola Avenue (fifty feet wide) parallel with and thirty feet southeastwardly from and measured at right angles to the northwesterly line of said Madola Avenue, the distance of one thousand four hundred and sixteen feet and fifty-two one-hundredths of a foot to a point;

thence the following five courses and distances by other land of The Pennsylvania, Ohio and Detroit Railroad Company:

(1) North twenty-six degrees twenty-one minutes thirty seconds, West, partly crossing said Madola Avenue, the distance of fifty-two feet to a point;

(2) Northeastwardly, by a curve to the left, having a radius of four hundred and sixty-six feet and thirty-four one hundredths of a foot, the initial tangent of which bears North sixty-three degrees thirty-eight minutes thirty seconds East the distance along said curve of two hundred and six feet and twenty-three one-hundredths of a foot to a point;

(3) North thirty-eight degrees sixteen minutes thirty seconds East, crossing the dividing line between said Lots Numbered Six and Seven, the distance of one hundred and fourteen feet and ninety-two one-hundredths of a foot to a point;

(4) North twenty-six degrees seven minutes West the distance of three hundred and twenty-five feet and twenty-four one-hundredths of a foot to a point distant sixty-six feet southeastwardly from a point in and measured at right angles to the northwesterly line of said Engel's Subdivision; and

(5) North sixty-three degrees fifty-three minutes East, on a line parallel with and sixty-six feet southeastwardly from, and measured at right angles to the said northwesterly line of Engel's Subdivision, crossing the dividing lines between said Lots Numbered Seven and Eight and of said Lots Numbered Eight and Nine, and partly recrossing said French Road, the distance of one thousand and thirty-three feet and forty-eight one hundredths of a foot to the said original center line of French Road;

and thence South thirty-five degrees forty-nine minutes forty seconds East along the same, being the northeasterly line of said Lot Number Nine, on a line parallel with and thirty-three feet northeastwardly from and measured at right angles to the southwesterly line of said French Road (eight-six feet wide) the distance of four hundred and seventy-three feet and sixty-four one-hundredths of a foot to the place of beginning, containing twelve acres and one hundred and sixty one-thousandths of an acre, more or less, of which three hundred and fifty-nine one-thousandths of an acre, more or less, is included within said French Road and Nine hundred and seventy-seven one-thousandths of an acre, more or less, is included within said Madola Avenue;

together with all buildings, improvements, utility lines, railroad tracks and any and all other easements or appurtenances thereunto belonging; together with the right to use the spur track owned by the Pennsylvania Railroad Company running through the premises and connecting with the main line of the Railroad Company, provided, however, that Borg-Warner assume and discharge any and all charges made by the Railroad Company for the use of this spur line; less and except, however, an Office Building and passage thereto.

Portions of the NIRP are sometimes hereinafter referred to as the "Facilities", the "Excepted Area," the "Manufacturing Area," the "Storage Area," and the "Parking Area". As hereinafter used, the "Facilities" means all the leased property as described above; the "Excepted Area" means the office building and the passageway above excluded from the leased property, said Area being delineated in yellow on drawing attached hereto as Exhibit "A", dated June 22, 1949 and bearing the legend "Clayton and Lambert Mfg. Co., Plant, Detroit, Michigan NOrd(F)-1056;" the "Manufacturing Area" means that portion of the Facilities delineated in red on Exhibit "A" hereto; the "Storage Area" means that portion of the Facilities delineated in purple on Exhibit "A" hereto; and the "Parking Area" means that portion of the Facilities laid out for or heretofore ordinarily devoted to the parking of vehicles.

ARTICLE 2. *Rights of Access and Use By the Government.*

The Government shall have the right to use in common with Borg-Warner so much of the Parking Area as is necessary to park cars and vehicles belonging to the Government, or its employees, and invitees by reason of its operations in the Excepted Areas.

At all times while this lease is in effect the Government shall have the right of access to the Facilities in order fully to exercise and to fulfill all its rights and obligations under this lease and to protect its interests thereunder and for any other purposes not inconsistent with the proper use of the Facilities by Borg-Warner.

ARTICLE 3. *Term.* The term of this lease shall be for a period of five (5) years, commencing on the 8th day of March, 1948, and ending on the 7th day of March, 1953, unless sooner terminated as herein provided. Borg-Warner shall have the option to extend the term hereof for three (3) additional terms of five (5) years each, by giving not less than two hundred and seventy (270) days written notice to the Department prior to the expiration of the term of this lease, subject to the conditions of Article 8.

86 ARTICLE 4. *Adaption of Facilities.* Borg-Warner shall, at its own cost and expense, and as the Government may direct, remove all Government-owned machine tools, equipment and materials, presently located on the property, from the Manufacturing Area and shall store all such property in the Storage Area. In this connection, Borg-Warner shall prepare and furnish the Government a "machine tool layout", showing present position and location of all such machine tools, equipment and materials, and thereafter a "storage layout" showing position of the machine tools, equipment and materials as stored. Borg-Warner shall further identify the machine tools, equipment and materials, wherever possible, with numbers corresponding to numbers shown on the "machine tool layout" and "storage layout". In addition, Borg-Warner shall, at its own cost and expense, erect a suitable barrier, constructed of material such as adequate woven wire fencing, or rock wallboard, segregating the tools within the Storage

Area from the Manufacturing Area, so as to properly protect the stored property of the Government.

ARTICLE 5. *Use.* Borg-Warner shall have the right to use the Manufacturing Area in its operations for the manufacture of automotive parts, agricultural implements and similar products and for no other purpose; shall use the Storage Area for the storage and maintenance of Government-owned machine tools, equipment and material and for no other purpose; and shall have the right to use the Parking Area for the accommodation of vehicles and for no other purpose; subject, however, to the Government's rights of use and entry stated in Article 2, *Provided, however*, that in the event the Government, by removal of the machine tools, equipment, and materials to be stored in the Storage Area, clears and makes available for use any of the space in the Storage Area, such space shall be deemed added to the Manufacturing Area, and Borg-Warner shall pay rent therefor in accordance with the provisions of Article 6 hereinbelow, *Provided*, further, that such space is adjacent to the Manufacturing Area or other parts of the Storage Area previously being used by Borg-Warner and such space in each case is in units of not less than 5,000 square feet.

Borg-Warner covenants and agrees that it recognizes and accepts the status of the NIRP as a national defense plant retained as a "standby facility" against a national emergency to be maintained at all times in such manner and condition so as to permit prompt reactivation for the manufacture of ordnance material, and that it will not perform any acts other than in accordance with the terms of this lease, which might be harmful to or reduce or impair such status.

ARTICLE 6. *Rent.* Borg-Warner shall pay as rent for the Facilities the sum of twenty thousand four hundred ($20,400.00) dollars for the period beginning March 8, 1948, and ending March 7, 1949, and for each lease year thereafter, the sum of two thousand four hundred ($2,400.00) dollars payable in advance. *Provided*, however, that if additional space is added to the Manufacturing Area by the removal of Government-owned materials stored in the Storage Area, as provided for hereinabove in Article 4, Borg-

Warner shall pay additional rent therefor at the rate of fifty-four and one half cents (54½) per square foot per annum, payable in advance.

87 Cash payments provided for in this Article shall be by certified check made payable to the Treasurer of the United States and presented to the Officer in Charge of this Contract for transmittal to the Officer in Charge, U. S. Navy Regional Accounts Office, Washington 25, D. C.

ARTICLE 7. *Maintenance.* (a) Borg-Warner shall protect, preserve, maintain and repair the Facilities and the Government-owned machine tools, equipment, and materials stored therein, in accordance with sound industrial practice, and as the Government may from time to time reasonably require or direct.

(b) In complying with this Article, Borg-Warner shall not (except as provided in (c) hereinbelow), be obligated to expend with respect to the items listed in paragraph (c) hereinbelow, a sum in excess of $43,600.00 during the first year of the term of this lease, $47,600.00 during the second year of the term of this lease, and $45,600.00 during the third and each succeeding year of the term of this lease, each amount hereinafter being referred to as the "maximum amount to be expended."

(c) Pursuant to the foregoing paragraph, only the costs to Borg-Warner of performing the following obligations shall be allowed as a credit against the maximum amount to be expended:

(i) Repairs to boilers, utility lines, service lines, and other items necessary to place the plant in condition for the purpose for which it is leased hereunder, *Provided*, that the cost of such repairs shall only be allowed as a credit against the maximum amount to be expended during the first and second years of the term of this lease.

(ii) Preservation, protection, maintenance and repair (including day to day and long term maintenance), of the Storage Area and the Government-owned machine tools, equipment and materials stored therein.

(iii) Long term maintenance on the balance of the Facilities.

Long term maintenance within the meaning of this Article is defined as any item of maintenance (including repair, partial or complete replacement, overhaul or rehabilitation), the recurrence of which is not anticipated within the next succeeding one year period, and the cost of which, when taken together with the cost of similar items which would normally be performed at or about the same time, or as a part of a single project, in accordance with sound industrial practice, approximates $250.00 or more. Long term maintenance shall in no event include day to day operational maintenance, janitorial service, garbage and trash collection and disposal, and cleanup work, which shall be performed by Borg-Warner, the cost of which shall not, except as provided in subparagraph (ii) of this paragraph, be allowed as a credit against the maximum amount to be expended. In determining the maximum amount to be expended hereunder, there shall be allowd as credits against such amount only the direct costs of labor and material, exclusive of overhead, properly allocable to the performance of Borg-Warner's obligations under this Article 7.

88 (d) Borg-Warner shall notify the Government immediately of any circumstances or conditions which require any work of protection, preservation, maintenance, or repair, concerning which the Government has not theretofore issued directions to Borg-Warner under this Article. In the event of an emergency in or upon or affecting the Facilities, involving imminent danger to persons or property, Borg-Warner shall immediately undertake and perform such work as may be reasonably necessary under the circumstances, where time does not permit Borg-Warner to obtain prior directions from the Government for the performance of such work.

(e) In the event that Borg-Warner's expenditures in complying with its obligations under this Article (computed as aforesaid) do not in any year of the term of this lease equal or exceed the applicable amount stated in (b) above, which Borg-Warner could be required to expend hereunder during such year, such difference or deficiency

shall be added to the applicable amount stated in (b) above, for the succeeding year or years.

(f) Upon the expiration or earlier termination of this lease, Borg-Warner shall remain obligated, within the maximum amount to be expended, as this amount may have been augmented under subparagraph (e) above, for the performance, within a reasonable time thereafter, of any item of preservation, protection, maintenance, or repair, the need of which arose or which was created prior to such expiration or termination, and any unexpended portion of the maximum amount to be expended, as augmented, which is not, in the determination of the Government, required for the performance of Borg-Warner's obligations hereunder, shall be disposed of by Borg-Warner as the Government may otherwise direct.

ARTICLE 8. *Renegotiation Upon Renewal.* If Borg-Warner gives timely notice of extension under Article 3 hereof, both parties hereto shall have the right to renegotiate and have redetermined the obligations under Articles 6 and 7 hereof (hereinafter called the "obligations"), for such extended term. Either party hereto may serve notice on the other of its intention to demand such renegotiation and redetermination at any time prior to the 7th day of November of the year preceding the last calendar year of the then current five (5) year term; *provided*, that if neither party serves such notice on the other prior to such time, and Borg-Warner has given timely notice of extension under Article 3, the obligations during the then current term shall obtain for the extended term. If as of the 7th day of December of the year preceding the last calendar year of the then current five (5) year term the parties hereto have not agreed upon the obligations to obtain for the ensuing term, this lease, or any extension hereof, shall expire on the 7th day of March of the last calendar year of the then current term.

ARTICLE 9. *Proration.* Obligations under this lease relative to the payment of rent or the expenditure of moneys for maintenance, repair, protection and preservation shall be prorated in the event of termination (other than for default under Article 11(*d*) of this lease) at any time other than the beginning of a lease year.

ARTICLE 10. *Risk of Loss—Insurance.* (a) All risk of loss of or damage to the Facilities during the term of this lease, including but not limited to loss or damage caused by the failure of Borg-Warner to exercise due diligence in complying with the provisions of this lease, or by any other fault or negligence of Borg-Warner, its agents, servants or employees, shall be borne by Borg-Warner and Borg-Warner shall, upon demand and at the election of the Government, subject, however, to the provisions of paragraph (e) hereinbelow, either compensate the Government for such loss or damage or effect rebuilding, replacement or repair of such loss or damage; *Provided*, however, that Borg-Warner shall be liable for loss of or damage to the Facilities resulting from risks expressly required to be insured against hereunder only to the extent of insurance so required to be procured and maintained or to the extent of insurance actually procured and maintained, whichever shall be the greater; and *Provided, further*, that Borg-Warner shall not be liable for loss of or damage to the Facilities arising from causes beyond the control of Borg-Warner and not customarily covered by insurance in the locality in which NIRP is situated. It is understood and agreed that Borg-Warner shall have no risk of loss or damage with respect to the Government-owned machine tools, machinery and equipment stored in the Storage Area except to the extent that such loss thereof or damage thereto is attributable to the failure of Borg-Warner to exercise due diligence in complying with the provisions of Article 7 hereof, or to the negligence or other fault of Borg-Warner, its agents, servants or employees.

(b) Borg-Warner shall procure and maintain at its own expense, the following property damage insurance with respect to the Facilities, in amounts and types which may exceed but shall not be less than the minimum amounts and types hereinafter specified:

Property	Type	Minimum Amount
The Facilities, less Government-owned machinery, machine tools and equipment in the Storage Area.	Fire and Extended coverage	$700,000.00

(c) Borg-Warner shall procure and maintain at its expense, with respect to its use or maintenance of the Facilities, and with respect to its maintenance of the Government-owned machinery, machine tools and equipment stored in the Storage Area, for the protection of Borg-Warner and the Government as their respective interests may appear, third party bodily injury and property damage insurance in the following amounts: $200,000.00 for bodily injury to any one person and $500,000.00 for bodily injury to more than one person in any one accident, and $100,000.00 for property damage in any one accident.

(d) Except as otherwise specifically provided herein, all policies of insurance required by this lease to be carried by Borg-Warner under (b) and (c) above shall be in such form, for such periods of time, and with such insurers as the Department may from time to time reasonably require or approve, which approval may permit Borg-Warner to be a self-insurer in appropriate circumstances, and shall contain provision for thirty (30) days' prior notice to the Office of Naval Material, Insurance Branch, Washington 25, D. C., in the event of cancellation of the policy on the part of the insurer. A certificate of insurance or a certified copy of each policy of insurance required to be taken out under (b) and (c) above shall be deposited promptly with said Insurance Branch. Borg-Warner agrees that not less than thirty (30) days prior to the expiration of any insurance required to be carried by Borg-Warner under (b) and (c) above, it will deliver to said Insurance Branch a certificate of insurance or a certified copy of each renewal policy to cover the same risks. Borg-Warner agrees to comply with all warranties and conditions in all such policies. All insurance required or carried by Borg-Warner against loss or damage to any of the Facilities shall be for the protection of the Government and Borg-Warner against loss or damage to any of the Facilities shall be for the protection of the Government and Borg-Warner against their respective risks and liabilities in connection with the Facilities, and each such policy of insurance shall name Borg-Warner and the United States of America (Department of the Navy) as the insured and shall contain a loss payable clause reading substantially as follows: "Loss, if any, under this policy shall be ad-

usted with the Borg-Warner Corporation and the proceeds, at the direction of the Government, shall be payable to Borg-Warner Corporation, and proceeds not paid to Borg-Warner Corporation shall be payable to the Treasurer of the United States of America."

(e) In the event that any item or part of the Facilities shall require repair, rebuilding or replacement resulting from loss or damage the risk of which is required to be covered by insurance hereunder, Borg-Warner shall promptly give notice thereof to the Department. If the proceeds of any insurance covering such loss or damage are sufficient to permit the completion of such repair, rebuilding or replacement, and if such proceeds are not in excess of 30% of the amount applicable to fire and extended coverage insurance as set forth in paragraph (b) above, Borg-Warner shall effect such repair, rebuilding or replacement. If the proceeds of any insurance covering such loss or damage are not sufficient to permit the completion of such repair, rebuilding or replacement or if such proceeds exceed 30% of said amount set forth in paragraph (b), Borg-Warner shall effect such repair, rebuilding or replacement if (and, in case such proceeds exceed said percentage, to the extent) required so to do by the Department, and any excess of the cost of such repair, rebuilding or replacement over such insurance proceeds as are available shall be allowed as a credit against the maximum amount to be expended, referred to in Article 7 hereof, with respect to the lease year in which Borg-Warner shall have commenced such repair, rebuilding or replacement and any balance not so credited shall be credited against the maximum amount to be expended with respect to the succeeding lease year. If it appears that the sum of the maximum amount to be expended with
91 respect to the lease year in which Borg-Warner shall have commenced such repair, rebuilding or replacement and the maximum amount to be expended with respect to the succeeding lease year will not be sufficient to permit such excess cost to be credited in full against such sum, Borg-Warner shall not be required to effect such repair, rebuilding or replacement unless and until the Department shall have agreed that the cost thereof shall be reimbursed to Borg-Warner. In the event that

Borg-Warner shall have effected any repair, rebuilding or replacement which Borg-Warner is required to effect pursuant to this paragraph, the Contracting Officer shall direct the payment to Borg-Warner of so much of the proceeds of any insurance carried by Borg-Warner and made available to the Government on account of loss of or damage to any item or part of the Facilities as may be necessary to enable Borg-Warner to effect such repair, rebuilding or replacement. In the event that Borg-Warner shall not have been required to effect such repair, rebuilding or replacement, and if the insurance proceeds allocable to the loss or damage which has created the need for such repair, rebuilding or replacement have been paid to Borg-Warner, Borg-Warner shall promptly refund to the Government the amount of such proceeds.

(f) Notwithstanding anything in the foregoing, in the event of loss of or damage to the Facilities which is not occasioned by the fault or negligence of Borg-Warner or by any failure or refusal on its part to comply fully with its obligations under this lease, then (provided that the expense thereof does not exceed the Allowable Sum described below) Borg-Warner may effect any necessary repair, rebuilding or replacement of the Facilities, the expense of which is not covered by Borg-Warner's assumption of risk under paragraph (a) above, without authorization or requirement by the Department and the expense of such repair, rebuilding or replacement shall be allowed as a credit against the maximum amount to be expended. The Allowable Sum above referred to shall be the difference between (i) the maximum amount to be expended with respect to the lease year in which Borg-Warner shall have commenced such repair, rebuilding or replacement, as such amount may have been augmented pursuant to paragraph (e) of Article 7, and (ii) $18,000.00 (representing a minimum annual maintenance allowance) or the portion of that sum allocable to the part of the lease year remaining after Borg-Warner shall have commenced such repair, rebuilding or replacement.

ARTICLE 11. *Termination by the Government.* This lease may be terminated by the Department at any time prior to the expiration of the term hereof (including any extension of such term):

(a) Without prior notice, upon the declaration of a national emergency by the President or the Congress;

(b) Following notice of one hundred and twenty (120) days if the Secretary of the Navy shall determine that the interests of national defense so require;

92 (c) Upon one hundred and twenty (120) days' notice if (i) the Secretary shall have determined that the NIRP is surplus to the further needs and responsibilities of the Department and (ii) the Government shall thereafter have offered the NIRP for sale as surplus, and (iii) the notice provided for in Article 13 shall have been received by Borg-Warner and Borg-Warner shall have notified the Government that it does not desire to exercise its right of first refusal granted by Article 13, or the sixty (60) day period of said notice shall have expired without exercise by Borg-Warner of said right, *Provided, however*, that notwithstanding any notice of termination given pursuant to this subparagraph (c), this lease and all rights and obligations hereunder shall continue in full force and effect until sixty (60) days after Borg-Warner has received the notice provided for in Article 13 hereof, or until this lease has been terminated pursuant to any other provision hereof, or has expired by its own terms, whichever shall first occur.

(d) Following notice of twenty (20) days (i) if Borg-Warner shall have defaulted in the performance of any of its obligations hereunder and shall not have corrected such default within twenty (20) days after receipt of a notice from the Department specifying such default, or within such longer period of time as the Department may determine to be reasonable and appropriate under all the circumstances to permit Borg-Warner, acting with due diligence, to cure such default, *Provided, however*, that this lease shall not be terminable under the provisions of this subparagraph (d) and Borg-Warner shall not be charged with any liability to the Government therefor if the default of Borg-Warner in the perform-

ance of its obligations of preservation, protection, maintenance and repair of the Facilities under the terms of this lease are due to causes beyond the control and without the fault or negligence of Borg-Warner, such causes including but not being restricted to (1) Acts of God or the public enemy; (2) Acts of the Government or any State or political subdivision thereof, (3) Fires, floods, explosions, earth quakes, or other catastrophes, (4) Epidemics (5) Quarantine restrictions, (6) Strikes, (7) Freight embargoes, (8) Unusually severe weather, (9) Inability of Borg-Warner to obtain equipment or material due to the operation of Governmental priorities, preferences or allocations of equipment or material, or (10) Delays of a subcontractor or supplier in furnishing material or supplies owing to causes beyond the control and without the fault or negligence of Borg-Warner, unless Borg-Warner could reasonably have procured the materials or supplies from other sources; or (ii) in the event of a filing of a petition by or against Borg-Warner for adjudi-
93 cation as a bankrupt, for reorganization, or for arrangement within the meaning of the Bankruptcy Act as now or hereafter amended, and such petition remains undismissed for a period of sixty (60) days or in the event of the appointment of a receiver or trustee of the property of Borg-Warner.

In the event of termination under this subparagraph (d), the Department shall have the immediate right to re-enter and resume possession of the Facilities and to remove all persons and property therefrom and such re-entry shall not be deemed an acceptance of a surrender of this lease. In the event of such termination, the Departmnt may, at its election, relet the whole or any portion of the Facilities for any period, equal to, greater than, or less than the remainder of the term of this lease to any person, for any sum and upon any terms deemed by the Department to be reasonable and satisfactory.

In the event of termination under this subparagraph (d) and whether or not the Facilities shall have

been relet, the Department shall be entitled to recover and Borg-Warner shall pay to the Department (I) the cost to it of resuming possession of the Facilities, (II) the cost to it of performing Borg-Warner's obligations hereunder of restoring, renovating, replacing, or repairing all or any part of the Facilities to their condition at the inception of this lease, reasonable wear and tear and loss or damage for which Borg-Warner is not responsible hereunder, excepted; (III) the cost to it of performing any other covenant on the part of Borg-Warner to be performed hereunder, and (IV) an amount equal to the aggregate of all rent reserved hereunder and not theretofore paid, less the net rent, if any, collected by the Department on reletting the Facilities, which amounts shall be due and payable by Borg-Warner at the times on which the rent reserved under this lease would have become due and payable.

At its election and in lieu of terminating this lease pursuant to this subparagraph (d), the Department may perform or cause said defaulted obligations to be performed for the account and at the expense of Borg-Warner, in which event Borg-Warner shall pay to the Department the cost to the Department of performing or causing said obligations to be performed.

ARTICLE 12. *Termination by Borg-Warner.* This lease may be terminated by Borg-Warner at any time prior to the expiration of the term hereof, or any renewal thereof, upon thirty (30) days written notice to the Department in the event of damage or destruction of all or a substantial part of the Facilities so as to render all of the Facilities incapable for use for the purpose for which they are leased hereunder or in the event of damage to or destruction of any complete item of the Facilities without which the Facilities could not be operated by Borg-Warner for such purposes, *provided,*

(i) such damage or destruction is

(a) occasioned by a risk not in fact covered and not customarily covered by insurance in the locality in which the Facilities are located, or

(b) occasioned by a risk which is expressly required to be covered by insurance hereunder and the
94 amount required to repair, rebuild or replace the loss or damage so as to render the Facilities or such essential item thereof fit for use for the purposes for which leased hereunder exceeds the amount of insurance required hereunder or actually procured and maintained with respect to such risk (whichever shall be greater), or

(c) occasioned by a risk which is insured against in compliance with the terms of this lease and the applicable insurance proceeds are sufficient to permit the completion of the repair, rebuilding or replacement of the loss or damage but such proceeds exceed thirty percent (30%) of the amount applicable to fire and extended coverage insurance as set forth in subparagraph (b) of Article 10.

and the Department either has not authorized or directed the repair, rebuilding or replacement of the Facilities, so as to render them fit as aforesaid, or does not make provision for payment for such repair, rebuilding or replacement by the application of insurance proceeds or otherwise, and

(ii) such damage or destruction is not occasioned by the fault or negligence of Borg-Warner or by any failure or refusal on its part fully to comply with its obligations hereunder.

Notwithstanding anything in the foregoing, it is understood and agreed that in the event of loss or damage with respect to which Borg-Warner shall have the right under paragraph (f) of Article 10 to repair, rebuild or replace without authorization or requirement by the Government, Borg-Warner's right of termination under this Article shall arise only if, upon the expiration of ninety (90) days after receipt by the Department of notice from Borg-

Warner that the cost of the repair, rebuilding or replacement required to render the Facilities or essential item thereof aforesaid fit for use for the purposes for which leased hereunder exceeds the allowable sum referred to in paragraph (f) of Article 10 plus the proceeds of insurance (if any) covering the loss or damage, the Department fails to authorize or direct the necessary repair, rebuilding, or replacement or to make provision for payment therefor; and said right of termination shall exist for thirty (30) days after so arising.

ARTICLE 13. *Right of First Refusal.* If the Secretary shall have determined that the Facilities or the major portion thereof are surplus to the needs and responsibilities of the Department and the Government shall thereafter offer the Facilities or the major portion thereof for sale as surplus, Borg-Warner shall have the right, within sixty (60) days after receipt of appropriate notice from the Government (and provided that this lease shall not, prior to the expiration of said sixty (60) days, have expired, or terminated by virtue of notice pursuant to paragraphs (a), (b), or (d) of Article 11 hereof) to purchase the Facilities or the portion thereof offered for sale as aforesaid upon the same terms and at the same price as contained in the best offer thereof received by and acceptable to the Government.

ARTICLE 14. *Taxation.* In the event that as a result of any future Act of Congress subjecting Government-owned property to taxation, taxes, assessments, or similar charges are imposed by state or local authorities upon the property leased hereunder (other than upon Borg-Warner's possessory interest therein), Borg-Warner shall pay
95 the same when due and payable and this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided for herein, which reduction shall not be greater than the amount of such taxes, assessments, or similar charges, *provided,* that, in the event that the parties hereto are unable to agree, within ninety (90) days from the date of the imposition of such taxes, assessments, or similar charges, on a rental which, in the opinion of the Contracting Officer, constitutes a reasonable return to the Government on the leased property,

then, in such event, the Contracting Officer shall have the right to determine the amount of the rental, which determination shall be binding on Borg-Warner, subject to appeal in accordance with Article 19(g) of this lease.

ARTICLE 15. *Alterations and Improvements.*

(a) *Consent* (i) Borg-Warner shall have the right at its own cost and expense and without the prior consent of the Department to make non-structural and minor additions, alterations and improvements to the leased premises, to attach or erect temporary signs or easily removable fixtures in and upon the premises and to install, arrange and rearrange in and upon the premises readily removable machinery, equipment and facilities belonging to Borg-Warner.

(ii) Borg-Warner at its own cost and expense shall also have the right to make substantial or structural additions, improvements and alterations to the leased premises *Provided,* however, that in each case the consent of the Department thereto is first obtained. The Department expressly reserves the right to make it a condition of such consent that any or all of such additions, improvements or alterations shall be removed upon expiration or termination of this lease and the Facilities affected thereby be restored to the same or as good condition as at the inception of this lease.

(iii) It is expressly agreed and understood that Borg-Warner shall have the right, at its own cost and expense, to erect a steel smokestack necessary for the operation of the power house at the NIRP. The Department, however, reserves the right to require that, upon expiration or termination of this lease or of any renewal hereof, Borg-Warner shall, at its own cost and expense, remove the smokestack and perform such restoration of the Facilities affected by such removal as the Department may require. It is further expressly agreed and understood that Borg-Warner shall have the right to make such alterations of and repairs to the boilers, and to make such alterations to and modifications of the utility lines, service lines and other similar items of the Facilities as may be necessary to place the premises in satisfactory condition for the installation and operation of Borg-Warner's machinery.

(b) *Title.* Title to the additions, alterations, improvements, and all other property described in paragraph (a)(i) of this Article shall remain in Borg-Warner, subject, however, to the provisions of Article 16. If, as provided in paragraph (a) (ii) of this Article, the Department shall, as a condition of its consent to their installation, require removal of any of such additions, improvements and alterations, title to any and all such additions, improvements and alterations so required to be removed, shall remain in Borg-Warner. Title to all other alterations, additions and improvements within the meaning of paragraph (a)(ii) of this Article, shall vest in the Government when annexed to or installed on the Facilities. Title to all repairs to the Facilities and to replacements of any portions thereof, including repairs to and replacements of all additions, alterations and improvements, except those owned by Borg-Warner, shall be in the Government.

(c) *Liens.* Borg-Warner shall not do or suffer anything to be done upon or in connection with the premises which may subject the Facilities or any part thereof to any liens or rights, *in rem*, and shall promptly discharge, or cause to be discharged, any lien or right *in rem*, of any kind other than one in favor of the Government, which shall at any time arise or exist with respect to the Facilities or to any alterations, additions, betterments or modifications thereto.

ARTICLE 16. *Removal, Restoration and Surrender:* (a) Except as may be expressly provided elsewhere in this lease, upon the expiration or termination of this lease, or any renewal hereof, Borg-Warner, at its own cost and expense,

(i) shall remove from the *Facilities* all alterations, additions, improvements, and all other property installed pursuant to the provisions of paragraph (a)(i) of Article 15, unless the Department shall consent to their abandonment;

(ii) shall remove from the Facilities all such alterations, additions and improvements, title to which is in Borg-Warner, installed pursuant to the Depart-

ment's consent under paragraph (a)(ii) of Article 15.

(iii) shall, if and to the extent required by the Department, replace and reinstall in the Manufacturing Area all Government-owned machine tools, equipment and material stored in the Storage Area in accordance with Exhibit "B" attached hereto, entitled "Machine Tool Layout Plan", including the making of such electrical and piping connections as are requested to restore such equipment to its operable condition at the inception of this lease;

(iv) shall, if and to the extent required by the department, replace, rearrange and reinstall all utility lines and service lines modified in accordance with paragraph (a)(iii) of Article 15 hereof, and perform such other acts as are necessary to restore the Facilities to substantially the same condition in all respects as said Facilities were in at the inception of this lease, including (without limitation) restoration of portions of the Facilities affected by the removal of additions, alterations or improvements or other property described in paragraph (a) of Article 15; and

97 (v) upon completion of the foregoing, shall surrender and peaceably vacate the Facilities.

(b) The Government shall, within sixty (60) days before the expiration of this lease (including any extension of the term hereof) or its termination by virtue of notice under Article 10(b) or Article 10(c), or within a reasonable time after termination hereof by virtue of notice under Article 10 (a), notify Borg-Warner of the extent of restoration required by the Government; *Provided*, however, that failure of the Government to give such notice within said times shall not relieve Borg-Warner of its obligations under paragraph (a) of this Article. If and after such notice is given by the Government, Borg-Warner shall not be subject to further requirements for restoration not included in such notice. In the event the Government gives such notice within the applicable time aforesaid, all obligations of Borg-Warner under this lease

(other than the performance of items of long-term maintenance and the payment of cash rent) shall continue in effect until Borg-Warner has completed its obligations under paragraph (a) of this Article, notwithstanding earlier ending of the term of this lease by reason of expiration or termination.

(c) During the period during which Borg-Warner is undertaking restoration, the Government shall progressively inspect such restoration in order to facilitate final approval of such restoration as hereinbelow provided. Within thirty (30) days after Borg-Warner has completed all items of restoration necessary or as directed by the Government, the Government shall, upon an inspection of the premises, and determination of satisfactory discharge of Borg-Warner's obligations of restoration, execute a release of Borg-Warner's obligations relative thereto.

ARTICLE 17. *Representations.* Borg-Warner has examined and knows the condition and state of repair of the Facilities as of the date first above written, accepts them as such and hereby acknowledges that the Government has made no agreement or promise to alter, improve, adapt or repair any of the Facilities or any part thereof during the term hereof. Borg-Warner acknowledges further that no representations concerning the condition or state of repair of any item of the Facilities, or part thereof, have been made by the Government prior to or at the time of the execution of this lease which are not set forth herein and further that this lease contains all the agreements made between the parties hereto.

ARTICLE 18. *Indemnification.* Borg-Warner shall indemnify and save and hold harmless the Government, its officers, agents and employees of and from any and all liability incurred as the result of any breach by Borg-Warner, its agents, servants, employees, invitees or licensees of any covenant or condition of this lease, or as the result of Borg-Warner's occupancy or use of the Facilities and whether or not occasioned by the negligence or lack of diligence of Borg-Warner, its agents, officers, servants or employees.

ARTICLE 19. *General Provisions.* (a) All uranium, thorium, and all other materials determined pursuant to

section 5(b)(1) of the Atomic Energy Act of 1946 (60 Stat. 761) to be peculiarly essential to the production of fissionable material, contained, in whatever concentration, in deposits in the Facilities are hereby reserved for the use of the United States, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same without payment of compensation for damage or otherwise. However, the Facilities may be used, and any rights otherwise acquired by this lease may be exercised, as if no reservation of such materials had been made; except that, when such use
98 results in the extraction of any such material from the land in quantities which may not be transferred or delivered without a license under the Atomic Energy Act of 1946, as it now exists or may hereafter be amended, such material shall be the property of the United States Atomic Energy Commission, and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission required the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other person as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction, and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of deposit in nature. If the Commission does not require delivery of such material to it, the reservation hereby made shall be of no further force or effect.

(b) *Failure of Government to Insist on Compliance.* The failure of the Government to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this lease shall not be construed as a waiver or relinquishment of the Government's right to the future performance of any such terms, covenants or conditions and Borg-Warner's obligations in respect of such future performance shall continue in full force and effect, and the receipt and acceptance of rent

shall not be deemed to be a waiver of any breach or default by Borg-Warner of any provision of this lease nor shall it invalidate or impair the efficacy of any termination or notice of termination hereunder unless expressly so agreed in writing by the Department.

(c) *Records.* (1) Borg-Warner shall keep adequate records and books of account showing the actual cost of all items of labor, material, equipment, supplies, services and other direct expenditures made in the performance of Borg-Warner's obligations under Article 7 hereof. The method of accounting employed by Borg-Warner shall be subject to the approval of the Department but no material change will be made therein if the same conforms to good accounting practices and is sufficient for the purposes of this lease.

(ii) The Department shall, at all reasonable times, be afforded proper facilities for inspecting the records and books of account pertaining to this lease and shall, at all reasonable times have access thereto for such purposes. All information obtained from said records and books of account shall be deemed confidential.

(d) *Transfer of Contract.* Neither this lease nor any interest herein shall be transferred or assigned by Borg-Warner, either voluntarily or by operation of law, except with the written consent of the Department nor shall any item of the Facilities or part thereof be subleased or otherwise made available by Borg-Warner to any third party or parties without such written consent.

(e) *Covenant against Contingent Fees.* Borg-Warner warrants that it has not employed any person to solicit or secure this lease upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to annul this lease, or in its discretion, to recover from Borg-Warner the amount of such commission, percentage, brokerage or contingent fee in addition to the consideration herein set forth. This warranty shall not apply to commissions payable by Borg-Warner upon contracts or sales secured or made through *bona fide* established commercial or selling agencies maintained by Borg-Warner for the purpose of securing business.

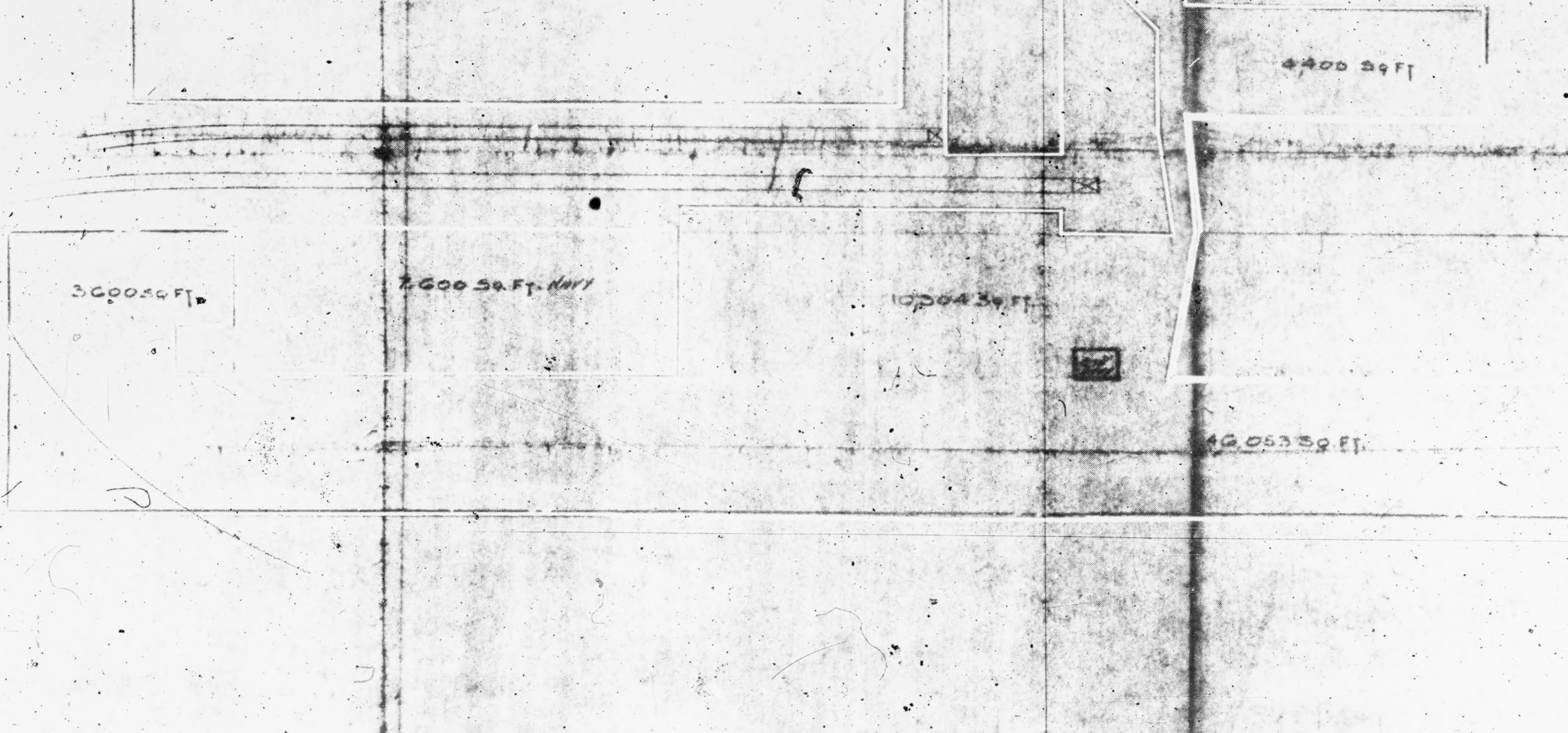
99 (f) *Officials Not to Benefit.* No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

(g) *Disputes.* Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this lease shall be decided by the Chief of the Bureau of Yards and Docks or his duly authorized representative, subject to written appeal to the Secretary or his duly authorized representative by Borg-Warner within thirty (30) days after receipt by Borg-Warner of the written decision of the Chief of the Bureau of Yards and Docks. The decision of the Secretary or his duly authorized representative will be final and conclusive upon the parties hereto. The existence or pendency of any dispute shall not excuse Borg-Warner from the continued performance of its obligations hereunder.

(h) *Definition of "Department".* "Department", as used in this lease, shall mean the Secretary of the Navy, the Chief of the Bureau of Yards and Docks, the Officer in Charge of this lease, and such other duly authorized representative or representatives as the Secretary or the Chief of the Bureau of Yards and Docks may designate from time to time.

(i) *Labor Provisions.* (i) Borg-Warner shall not employ in the performance of any work required to be performed under this lease, any person undergoing sentence of imprisonment at hard labor;

(ii) No laborer or mechanic doing any part of the work required to be performed under this lease, in the employ of Borg-Warner or any subcontractor contracting for any part of said work, shall be required or permitted to work more than eight hours in any one calendar day upon such work, wherever performed, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this subparagraph (ii). The wages of every laborer and mechanic employed by Borg-Warner or any subcontractor engaged in the per-


4,400 Sq Ft
3C,005q Ft
7,600 Sq.Ft. Navy
10,204 Sq Ft
40,053 Sq Ft

30,520 sq ft

ORIGINAL BLG. 16
" 30
SECOND ADDITION
THIRD "
PICKLING BLG.

TOTAL CU FT.

4,400 SQ FT

ORIGINAL BLG. 16 TO CEILING 675,000 CU FT
" 30 " 1,350,000 "
SECOND ADDITION 536,000 "
THIRD " 430,000 "
PICKLING BLG. 19,000 "

TOTAL CU FT. 3,010,000

4,400 SQ FT

30 520
4,190
10,381
3,600
16,053
74,877

4,400 SQ FT

48,176 SQ FT. NAVY

46,053 SQ. FT.

Defendants Exhibit 2

Form C of D-11-50

WARD _____

CITY OF DETROIT

PERSONAL PROPERTY ASSESSMENT ROLL

1954

LINE	REGISTERED MAIL NOTICE NUMBER	FIELD BOOK PAGE	ITEM NUMBER	OWNER OR TAXPAYER / ADDRESS	BUSINESS AND SALES TAX NUMBER	ASSESSMENT 1953	ASSESSMENT 1954	CHECK	STATEMENT FILED	ACCEPTED OR NOT ACCEPTED	FIELD APPRAISER	TRUE AND LAWFUL ASSESSMENT DETERMINED BY THE STATE TAX COMMISSION
1				BORG-WARNER, DET GEAR 11111 FRENCH RD MAIL 12345 KERCHEVAL	LEASED ACT LAND 189 BLDG PA 1953		352,060					
2				FELDMAN, MITCHELL 905 FARMER MAIL - 2709 CADILLAC TOWER	ACT LEASED 189 LAND PA 1953		12230					
3				HOUSTON HAYES LAND CO COR. KELLY & WHITTIER MAIL 815 HAMMOND BLDG	LEASED ACT LAND 189 PA 1953		~~12,350~~ ~~8240~~ 500			B. of R. ID. & Pet. No. ~~8240~~ 8240		
4												
5				JEFFERSON CORP, FORMERLY MC CARTHY ROOT CORP 4300 W JEFFERSON	LEASED ACT LAND 189 BLDG PA 1953		690,770					

LINE	REGISTERED MAIL NOTICE NUMBER	FIELD BOOK PAGE	ITEM NUMBER	OWNER OR TAXPAYER / ADDRESS	BUSINESS AND SALES TAX NUMBER	ASSESSMENT 1953	ASSESSMENT 1954	CHECK	STATEMENT FILED	ACCEPTED OR NOT ACCEPTED	FIELD APPRAISER	TRUE AND LAWFUL ASSESSMENT DETERMINED BY THE STATE TAX COMMISSION
4												
5				JEFFERSON CORP, FORMERLY MC CARTHY ROOT CORP 4300 W JEFFERSON DETROIT 9, MICH	LEASED ACT LAND 189 BLDG PA 1953		690,770					
6												
7				FELDMAN, MITCHELL ~~SILLOWAY & CO~~ 905 FARMER MAIL 840 BURL BLDG	LEASED ACT LAND 189 PA 1953		~~12,230~~					
8												
9												
10												

108

formance of work required under this lease shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this subparagraph (ii) a penalty of *Five Dollars* ($5.00) shall be imposed upon Borg-Warner for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this subparagraph (ii), and all penalties thus imposed shall be withheld for the use and benefit of the Government; Provided, that this stipulation shall be subject in all respects to the exceptions and provisions of the Act of June 19, 1912 (U.S. Code, Title 40, Sections 324 and 325) relating to hours of labor, as modified by the provisions of Section 303 of Public Law No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime; and

(iii) Borg-Warner, in performing the work required to be performed under this lease, shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin. All subcontracts made under this lease shall contain similar provisions. For the purpose of this Article, subcontracts shall be deemed to include all purchase orders and agreements to perform all of any part of the work, or to make or furnish any article required for the performance of work to be performed under this lease, except purchase orders or agreements for the furnishing of standard commercial articles or raw materials.

(j) *Notices.* No notice, order, direction, determination, requirement, consent or approval under this lease shall be of any effect unless in writing.

(k) *Exhibits.* The Exhibits attached hereto and all matters contained therein are hereby made a part of, and incorporated in, this lease.

ARTICLE 20. *Survival.* This lease shall be binding upon the Lessee, its successors, and assigns.

ARTICLE 21. *Letter of Intent Terminated.* Letter of Intent dated March 8, 1948, as modified by letter of June 4, 1948 and by letter of December 13, 1948, is hereby terminated and superseded in its entirety.

ARTICLE 22. *Administration.* The administration of this lease will be under the general direction of the Chief of the Bureau of Yards and Docks, known as the "Contracting Officer". The Contracting Officer shall designate an officer of the Civil Engineer Corps, United States Navy, or other representative of the Department as Officer in Charge of Contract, who shall, under the direction of the Contracting Officer, have complete charge of the administration of this lease and shall exercise full supervision and general direction of this lease, so far as it affects the interest of the Department.

IN WITNESS WHEREOF, the parties hereto have, on the respective dates set forth below, duly executed this lease as of the day and year first above written.

14 August 1950

UNITED STATES OF AMERICA

By Jack E. Cochrane
By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

7 August 1950

BORG-WARNER CORPORATION

By H. E. Blood
Title Vice-Pres.

101 I, R. W. Dosé, certify that I am Secretary of the corporation named as Lessee herein, that H. E. Blood who executed this lease on behalf of the Lessee was then Vice President of said corporation; that this lease was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

R. W. Dosé
Secretary

(CORPORATE SEAL)

102 STATE OF ILLINOIS
COUNTY OF COOK ss.

The undersigned, R. W. Dosé, hereby certifies that he is Secretary of Borg-Warner Corporation, a corporation duly organized and existing under the laws of the State of Illinois, with its office in the City of Chicago, Illinois, and as such Secretary has the custody of all records, minutes and proceedings of the Board of Directors of said corporation.

The undersigned further certifies that at a meeting of the Board of Directors of Borg-Warner Corporation, held in the conference room of the corporation on the 16th floor of 310 South Michigan Avenue, Chicago, Illinois, on Friday, August 4, 1950, at 2:00 P. M., at which meeting a quorum of the directors of said corporation was present, the following resolution was duly adopted:

> WHEREAS, the Board of Directors has previously approved the negotiation of Lease No. NOy(R)-60040 with the United States of America acting through the Department of the Navy, covering a Naval Industrial Reserve Plant; formerly known as Clayton & Lambert Manufacturing Company, located at 11111 French Road, Detroit, Michigan, as covered by a Letter of Intent, dated March 8, 1948, modified June 4, 1948 and December 13, 1948, and a definitive lease has now been prepared covering the terms and conditions thereof, clarifying the terms of said lease as set forth in the Letters of Intent.
>
> NOW, THEREFORE, BE IT RESOLVED, that H. E. Blood, Vice President, be and he is hereby authorized to execute such lease as of March 8, 1948, and R. W. Dosé, as Secretary, is hereby authorized to attest to the same.

IN WITNESS WHEREOF, the undersigned has hereunto subscribed his name as Secretary of Borg-Warner Corporation and has affixed hereto the seal of said corporation this 7th day of August, 1950.

R. W. Dosé
Secretary
Borg-Warner Corporation

(CORPORATE SEAL)

104 **Co-plaintiffs' Exhibit "B"**

FIRST AMENDMENT TO LEASE NOy(R)-60040

between

THE UNITED STATES OF AMERICA

and

BORG-WARNER CORPORATION

THIS AGREEMENT, made and entered into as of the 1st day of December 1952, between THE UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the Contracting Officer executing this Agreement, and BORG-WARNER CORPORATION (hereinafter called "Borg-Warner"), a corporation organized and existing under the laws of the State of Illinois, whose address is 310 South Michigan Avenue, Chicago 4, Illinois;

WITNESSETH:

WHEREAS, by Lease Contract NOy(R)-60040, in full force and effect between the parties hereto, the Government leased to Borg-Warner the Naval Industrial Reserve Plant, formerly known as Clayton and Lambert Manufacturing Company, located at 11111 French Road, Detroit, Michigan, for a period of five (5) years, commencing on 8 March 1948 and ending on 7 March 1953, with an option to extend this term for three (3) additional terms of five (5) years each; and

WHEREAS, Borg-Warner has given the Government timely notice of its election to extend the term of Lease Contract NOy(R)-60040 for an additional period of five (5) years commencing March 8, 1953, pursuant to the provisions of Article 3 of the contract, and the Government has given Borg-Warner timely notice of its intention to demand renegotiation and redetermination of the terms and conditions to obtain under the lease contract during the extended term, pursuant to the provisions of Article 8 of the contract, and the parties have heretofore agreed on the terms and conditions to obtain under the lease during the five (5) year period commencing March 8, 1953.

105 NOW THEREFORE, in consideration of the premises, and of the benefits and advantages to be derived therefrom, the parties hereto do hereby mutually agree that Lease Contract NOy(R)-60040 be and is hereby amended, effective March 8, 1953, in the following respects:

1. Strike out ARTICLE 3. *Term*, and substitute in lieu thereof the following:

> "ARTICLE 3. *Term*. The term of this lease shall be extended for a period of five (5) years, commencing on the 8th day of March, 1953, and ending on the 7th day of March, 1958, unless sooner terminated as herein provided. Borg-Warner shall have the option to extend the term hereof for two (2) additional terms of five (5) years each, by giving not less than two hundred and seventy (270) days written notice to the Department prior to the expiration of the term of this lease, subject to the conditions of Article 8."

2. Add the following sentence to ARTICLE 4. *Adaption of Facilities*:

> "Borg-Warner shall, at its own cost and expense, and not as a charge against the maximum amount agreed to be expended for maintenance as provided in ARTICLE 7 of this lease contract, heat the space at the subject Plant, which is retained by the Government, in accordance with standard factory practice and to the same extent that Borg-Warner heats that portion of the premises leased during periods of its normal production."

3. Strike out ARTICLE 6. *Rent*, and substitute in lieu thereof the following:

> "ARTICLE 6. *Rent*. (a) Borg-Warner shall upon execution of this first amendment to Lease Contract NOy(R)-60040, pay to the Government as additional cash rent for first five (5) years of the term of the lease beginning March 8, 1948, and ending March 7, 1953, the sum of Forty-four Thousand Nine Hundred and Sixty-six Dollars and Sixty-four Cents ($44,966.64), representing the unexpended portion of the

maximum amount to be expended for maintenance, all as provided in ARTICLE 7 of this lease contract.

(b) Borg-Warner shall pay as rent for the Facilities, the sum of Twenty-four Thousand ($24,000.00) Dollars per annum, payable monthly in advance for the year commencing March 8, 1953, and terminating March 7, 1954, and thereafter payable semi-annually (first payment due September 8, 1954), for the period commencing March 8, 1954, and ending March 7, 1958, *Provided, however,* that if additional space is added to the manufacturing area by the removal of Government-owned materials stored in the storage area as provided for herein in ARTICLE 4, Borg-Warner shall pay additional rent therefor at the rate of seventy
106 (70¢) cents per square foot per annum, payable semi-annually, and,

Provided, further, that, effective March 8, 1954, and throughout the remaining term of the extended lease, Borg-Warner shall deduct and pay from the stipulated semi-annual rental installments any taxes assessed against it under the provisions of Public Act 189 of the State of Michigan for the year 1953 or other taxation statutes coming into effect during the extended term of the lease and which attempt to tax Borg-Warner on the basis of the assessed value of the Facilities leased to it or on the basis of the value of its leasehold interest therein or for any other reason because of its use and occupancy of the same under this lease. Borg-Warner will pay the personal taxes assessed against its own property located in said Facilities. The Government reserves the right to contest the legality of said Public Act 189 or any other of such described taxation statutes coming into effect during the extended term of the within lease, and, should it successfully do so, Borg-Warner shall repay to the Government any taxes actually refunded by such determination. Borg-Warner agrees to cooperate with the Government in respect to such possible litigation, including the payment of such taxes under protest, if so required by the Government.

(c) Cash payments provided for in this ARTICLE 6 shall be by certified check, payable to the Treasurer of the United States, delivered to the Officer in Charge of this Contract for transmittal to the Officer in Charge, U. S. Navy Regional Accounts Office, Washington 25, D. C."

4. Strike out paragraph (b) of ARTICLE 7. *Maintenance*, and substitute in lieu thereof the following:

"(b) In complying with this Article, Borg-Warner shall not (except as provided in (c) hereinbelow), be obligated to expend with respect to the items listed in paragraph (c) hereinbelow, a sum in excess of Thirty-five Thousand ($35,000.00) Dollars per annum, such amount being hereinafter referred to as the "maximum amount to be expended."

5. Strike out subparagraph (i) of paragraph (c) of ARTICLE 7. *Maintenance.*

6. Strike out paragraph (b) of ARTICLE 10. *Risk of Loss—Insurance*, and substitute in lieu thereof the following:

"(b) Borg-Warner shall procure and maintain at its own expense, the following property damage insurance with respect to the Facilities, in amounts and types which may exceed but shall not be less than the minimum amounts and types hereinafter specified:

Property	Type	Minimum Amount
The Facilities, less Government-owned machinery, machine tools and equipment in the Storage Area.	Fire and extended coverage	$1,000,000.00"

7. Except as herein amended, all other terms and conditions of Lease Contract NOy(R)-60040 shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have, on the respective dates set forth below, duly executed this First

Amendment to Lease Contract NOy(R)-60040 as of the day and year first above written.

THE UNITED STATES OF AMERICA

Date 3 March, 1954 By Jack E. Cochrane
By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

BORG-WARNER CORPORATION

By L. G. Porter
Title Vice-President

Approved
/s/ R. N. Murphy
Date February 23, 1954

I, H. H. Gehlbach, certify that I am an Assistant Secretary of the corporation named as Lessee herein, that L. G. Porter who executed this First Amendment to Lease Contract NOy(R)-60040 on behalf of the Lessee was then a Vice-President of said corporation; that this lease was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

By H. H. Gehlbach
(CORPORATE SEAL) Title Assistant Secretary

Note

Page 96 is blank

Page 97 is the large form immediately above this frame.

109 [Clerk's Certificate to foregoing omitted in printing.]

110 SUPREME COURT OF THE UNITED STATES

No. 487

October Term, 1956

(Title omitted)

APPEAL from the Supreme Court of the State of Michigan.

Order Noting Probable Jurisdiction—January 14, 1957

The statement of jurisdiction in this case having been submitted and considerd by the Court, probable jurisdiction is noted. The case is consolidated with Nos. 401, 564 (and 565) and 563 and a total of three hours allowed for oral argument.

Office - Supreme Court, U.S.
FILED
OCT 8 1956
JOHN T. FEY, Clerk

No. 487

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (DETROIT GEAR DIVISION), AN ILLINOIS CORPORATION, APPELLANTS

v.

CITY OF DETROIT, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
HILBERT P. ZARKY,
LYLE M. TURNER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (DETROIT GEAR DIVISION), AN ILLINOIS CORPORATION, APPELLANTS

v.

CITY OF DETROIT, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Circuit Court of Wayne County, Michigan, is not reported. The opinion of the Supreme Court of Michigan affirming the judgment of the Circuit Court is reported in 345 Mich. 601. The opinions of the Circuit Court and the Supreme Court of Michigan are set forth in the Appendix, *infra*, pp. 14–28.

JURISDICTION

This suit was brought under the authority of Section 211.53, Compiled Laws of Michigan (1948), Section 7.97, 6 Michigan Statutes Annotated, for the recovery of taxes assessed, levied and collected under

the provisions of Act No. 189, Public Acts of Michigan, Session of 1953. It was alleged that the Michigan statute, as applied to the facts of this case, was repugnant to the Constitution of the United States and invalid. The Supreme Court of the State of Michigan decided the question in favor of the validity of the statute and the taxes which it imposed, and entered judgment May 14, 1956. Notice of appeal was filed by the United States and Borg-Warner Corporation on August 9, 1956. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred on this Court by 28 U. S. C. 1257 (2) and 2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481; *United States* v. *Allegheny County*, 322 U. S. 174, 191; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

STATUTE INVOLVED

Michigan Public and Local Acts (1953), p. 252:

PUBLIC ACT No. 189.

AN ACT to provide for the taxation of lessees and users of tax-exempt property.

The People of the State of Michigan enact:

SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public

airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

This act is ordered to take immediate effect. Approved June 10, 1953.

QUESTIONS PRESENTED

1. Whether Act 189 of the Public Acts of Michigan (1953), as applied to the facts of this case, is repugnant to the Constitution of the United States and invalid because it taxes the property of the United States without the consent of Congress.

2. Whether Act 189, which taxes the property of the United States—to the full extent of its value—to its lessee, is repugnant to the Constitution and laws of the United States, where Congress by express statute has exercised its powers of legislation

with respect to the property to provide that a state may tax only to the extent of the value of the lessee's interest and not to the same extent as though the lessee were the owner of the property.

3. Whether Act 189 is repugnant to the Constitution of the United States and invalid as violative of the due process and equal protection clauses of the Fourteenth Amendment because it taxes to Borg-Warner Corporation property, or the value of property, which Borg-Warner Corporation does not own but which the Act conclusively presumes it does own.

4. If Act 189 is construed as imposing a privilege tax, whether it is repugnant to the Constitution and laws of the United States because it would tax the privilege of using federal property placed in the possession of the user under the terms of a federal statute designed and enacted to accomplish a federal purpose, and whether it is repugnant to the Constitution and laws of the United States as an undue interference with the exercise by Congress of its constitutional right to dispose of and make all needful rules and regulations respecting the property belonging to the United States.

5. If Act 189 is construed as imposing a privilege tax on the lessees or users of immune federal property, whether it is repugnant to the Constitution of the United States and invalid as discriminatory in purpose and effect since it is not imposed on all lessees or users of real property but is directed at federally owned property for the purpose of collecting from the lessees or users taxes which the State

cannot assert against or collect from the United States itself or its property.

STATEMENT

Borg-Warner Corporation, an Illinois corporation, is a lessee of a portion of real property consisting of an industrial plant, building, and grounds, located at 11111 French Road, Detroit, Michigan, under a lease from the United States of America, lessor, dated August 14, 1950, effective March 8, 1948, and entered into under the authority of the Act of August 5, 1947, c. 493, 61 Stat. 774. The lease was amended by a written amendment, dated March 3, 1954, and effective as of December 1, 1952. The lease expires on March 7, 1958. It may be terminated unilaterally by the Government (a) upon declaration of a national emergency by the President or Congress, (b) upon 120 days' notice in the interest of national defense, (c) upon an offer to sell as surplus and notice by the lessee that it does not desire to exercise its purchase option, and (d) upon 120 days' notice for the lessee's default in its obligations under the lease.

In accordance with the Act of August 5, 1947, *supra,* the lease provides that if Congress acts to subject the leased premises, as distinguished from the leasehold interest, to local taxation, the lease is to be renegotiated. The amendment to the lease provides that effective March 8, 1954, and thereafter, Borg-Warner shall deduct from its rental payments any taxes assessed against it under Act 189, Michigan Public Acts of 1953, or similar taxation statutes, and that it will repay to the United States any taxes re-

funded to it and that Borg-Warner will cooperate with the Government to contest the validity of such taxes if requested to do so.

The portion of the premises leased by Borg-Warner is used by it exclusively for manufacturing purposes in its business conducted for a profit. The United States is and has been the sole owner, in fee simple, of the leased premises.

As of January 1, 1954, an assessment was made against Borg-Warner Corporation by the Board of Assessors of the City of Detroit for a tax levied under the provisions of Act 189, Michigan Public Acts of 1953, *supra*.

As to the assessment, the parties stipulated that:

1. The Board of Assessors valued the property precisely as it would have done had such property been owned in fee simple and occupied by Borg-Warner Corporation.

2. It valued such property at the true cash value of the fee simple ownership of that portion of the plant site under lease, on the basis defined in Section 211.27, Compiled Laws of 1948 (Section 7.27, 6 Michigan Statutes Annotated), giving consideration to the advantages and disadvantages enumerated in such statute.

3. The valuation concerned itself solely with that portion of the premises leased by Borg-Warner Corporation.

4. The valuation of the leased real estate thus determined was in the amount of $352,060 and such valuation was accordingly set down upon the personal

property tax rolls of the City of Detroit opposite the description of the parcel.

5. The portion under lease was not assessed to Borg-Warner Corporation pursuant to Section 211.3, Compiled Laws of 1948 (Section 7.3, 6 Michigan Statutes Annotated), as an "occupant".

6. The cash value of the right to use and occupy such parcel granted to Borg-Warner Corporation by its lease with the United States of America was not separately determined or valued.

As a result of the assessment, a tax for the year 1954 in the amount of $12,327.50 was assessed and billed to Borg-Warner Corporation by the City of Detroit. On August 16, 1954, Borg-Warner paid to the Treasurer of the City of Detroit the amount of $6,161.75, the first half of the 1954 tax, under written protest.

Neither Borg-Warner nor the United States has ever made any claim that the quantum of the assessment was erroneous.

The cause was submitted in the Circuit Court on a written stipulation of facts similar to that stipulated as the settled record on appeal, together with the introduction of certain important documents into evidence at the trial thereof which are a part of the record on appeal.

On August 25, 1955, a judgment of no cause of action was entered by the trial judge, pursuant to his written opinion.

On appeal, the Supreme Court of Michigan approved the decision of the trial court, thereby sustaining the imposition of the tax.

The appellants contended at every stage of the proceedings that Act 189 is repugnant to the Constitution of the United States and invalid in that it authorizes a tax upon real property owned by the United States of America, infringes the sovereign immunity of the United States, and violates the Fourteenth Amendment of the Constitution. The constitutional questions were raised in the trial court in the Declaration filed by the United States and Borg-Warner (R. 5–8) and in the briefs filed in the trial court and also in the Supreme Court of Michigan. The constitutional objections were considered but rejected both by the trial court (R. 47–50) and by the Supreme Court of Michigan (Op. pp. 1–9).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important constitutional questions involving the immunity of the United States from taxation of its property by the States. The decision of the Supreme Court of Michigan, upholding the validity of a local tax which is imposed on a lessee of property belonging to the United States and which is measured by the full value of the property, carries obvious and far-reaching implications. While the precise point in issue has not been, but ought to be, settled by this Court, we believe that fundamental principles regarding the sovereign immunity of the United States, which have received repeated application in the decisions of this Court, compel the conclusion that the tax in question is constitutionally invalid.

1. *United States* v. *Allegheny County*, 322 U. S. 174, involved a lessee of machinery owned by the

United States. In the assessment of local *ad valorem* property taxes, the value of the machinery was included in the value of the lessee's property subject to tax. This Court held that the tax was invalid, saying that the property of the Federal Government (p. 189) "to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

Although there are certain formal differences between the local property tax held invalid in the *Allegheny County* case and the tax imposed in the present case, in every essential respect the situations are similar. We believe that the Supreme Court of Michigan erred in holding that these minor differences were sufficient grounds of distinction which would warrant the conclusion that the tax here was valid, despite the holding in *Allegheny County* that the tax there was invalid.

(a) The tax here cannot be upheld as a tax on the lessee of the property rather than a tax on the property itself. In *Allegheny County*, the taxing authorities similarly denied that the tax was on the property of the United States. But this Court, looking to the mode of the tax, namely (p. 184), "the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment," and "the application of a uniform rate calculated on the need for public revenues," concluded that the tax was on the property and not a form of personal taxation.

The same general characteristics are to be found in the tax here in issue. Property which is other-

wise exempt from taxation is identified and valued in the same manner as property which is not exempt. That is, the assessment is the same as it is with respect to property which is concededly subject to the general property tax. And the tax is calculated at the same uniform rate which is assessed to owners of property subject to the general property tax. Hence, neither the values being assessed nor the tax rate being imposed differ in any respect from the general property tax which is concededly imposed on the property itself. Accordingly, here, as in *Allegheny County*, the conclusion seems inevitable that the tax is not a form of personal taxation, but is a property tax.

(b) The tax here gains no vitality from the statutory provisions which preclude the tax from being a lien on the property itself. In the *Allegheny* case it was also argued, in support of the tax, that the tax lien would not extend to the machinery in question. The answer which this Court gave in that case is equally applicable here; the opinion stated (p. 187): "But renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed."

(c) Finally, the tax here imposed does not lose its constitutional infirmities simply because the Supreme Court of Michigan characterized it as a specific tax imposed on the lessee for the privilege of leasing the Government's property. As we have observed, the nature of the tax requires the conclusion that it is on the property itself. Moreover, since the Government can act only through instrumentalities and agencies, a

tax imposed on the right to have possession of the Government's property and measured by the full value of the property, is a tax which cannot be constitutionally imposed in the absence of the express consent of Congress. As this Court observed in the *Allegheny County* case, a state can no more tax to a government contractor the full value of government property in his possession than it could tax a (p. 189) "Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer" because of moneys of the United States which were in his possession.

This case does not present the question whether, in the absence of the consent of Congress, a state could tax the lessee on the privilege of leasing property of the United States where all that is being taxed is the value of that privilege. Congress has specifically consented to such taxation (Act of August 5, 1947, c. 493, 61 Stat. 774), but the Michigan tax does not purport to value or tax the lessee's interest. And, clearly, the lessee's interest here, in view of the short term of the lease and the provisions for cancellation, could not equal the full value of the property itself. Cf. *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253.

2. The United States, as the owner of property strategically important to the national defense in the event of an emergency, has leased it on a stand-by basis to a commercial user, thus insuring that the property will be available whenever it is needed by the United States. The lease provides for a rental which requires the lessee to pay an adequate consideration for the use of the property; indeed, since the

full rental value is already being paid by the lessee, the lease specifically provides that any tax required to be paid by the lessee with respect to its use of the property shall be deducted from its rental obligation.

We believe it is plain that any local tax of the kind here involved, imposed on the lessee as a consequence of its possession of Government-owned property, represents an undue and unconstitutional interference with the sovereign right of the United States freely to possess or dispose of its property.

3. We think it is equally plain that this case presents a question of substantial importance which affects the United States and every State. If the Supreme Court of Michigan is correct, the *Allegheny County* case means no more than that, to impose a valid tax, a state legislature need only bill the tax to the lessee, while still taxing the full value of the Government-owned property at the same rate at which all other property is taxed. The correctness of such a view of the Constitution can be settled only by a decision of this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

HILBERT P. ZARKY,
LYLE M. TURNER,
Attorneys.

OCTOBER 1956.

APPENDIX

STATE OF MICHIGAN
SUPREME COURT

[Caption omitted.]

OPINION

BEFORE THE ENTIRE BENCH.
DETHMERS, C. J.

The United States owns real estate consisting of an industrial plant, building and grounds in Detroit. A portion of it is leased to plaintiff Borg-Warner Corporation, which uses it exclusively for manufacturing purposes in its business conducted for profit. The lease provides that Borg-Warner may deduct from rent to United States any taxes assessed against and paid by Borg-Warner under PA 1953, No. 189 (CLS 1954, Secs. 211.181, 211.182 [Stat. Ann. 1955 Cum. Supp. Secs. 7.7 (5), 7.7 (6)]), by reason of its use of the premises, that it will cooperate with United States to contest validity of such taxes and pay same under protest, if required by United States, and that it will repay United States any such taxes refunded.

Act No. 189 reads:

> AN ACT to provide for the taxation of lessees and users of tax-exempt property.
>
> *The People of the State of Michigan enact:*
>
> 211.181 Taxation of lessees and users of tax-exempt property; exception.
>
> [M. S. A. 7.7 (5)]
>
> SEC. 1. When any real property which for any reason is exempt from taxation is leased,

loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182 Assessment and collection; action of assumpsit. [M. S. A. 7.7 (6)].

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

Under the act the taxing authorities of defendant city imposed a tax on Borg-Warner, measured by the true cash value of the leased real estate. Borg-Warner paid the first half of the tax under written protest and this action was brought to recover it. From judgment of no cause for action plaintiffs appeal.

Plaintiffs contend that Act 189 provides for an *ad valorem* general property tax on real property owned by United States and is, therefore, repugnant to the Constitution of the United States, which impliedly grants immunity from State and local taxation to

property of United States. Defendant counters with the contention that it is a specific tax on Borg-Warner's privilege of using the property, which tax may, constitutionally, be measured by the full value of that property.

Plaintiffs believe that *United States* v. *Allegheny County*, 322 U. S. 174, is controlling, urge that under decision in that case the tax in the instant case must be held to be on United States property, and quote from opinion therein.

> We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

In that case Mesta Machine Company undertook to make guns for United States. It owned a manufacturing plant which was not equipped for manufacture of ordnance. United States leased necessary machinery to Mesta, which installed it in its plant. Allegheny County, in assessing Mesta's real property for *ad valorem* taxes, included the value of the machinery. This the court held unconstitutional as constituting imposition of a tax on immune property of United States. The court said, *inter alia:*

> It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. * * * This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is

lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: "The following *subjects and property* shall * * * be valued and assessed, and *subject to taxation.*" Taxes are "declared to be a *first lien on said property.*" (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. * * *

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States. * * *

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * *

We think, however, that the Government's property interests are not taxable either to it or to its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purpose. He may be an officer, an agent, or a contractor. *His personal advantages from the relationship by way of* salary, profit, or *beneficial personal use of the property may be taxed as we have held.* But neither he nor the Government can be taxed for the Government's property interest. [Emphasis supplied.]

We agree with defendant that Allegheny is distinguishable from the instant case in controlling respects. To begin with, the hiatus in Section 1 of Act 189, resulting from failure to express the subject of the predicate "shall be subject to taxation", which has been expressed in the bill as passed in the House, was apparently occasioned by inadvertent omission in the Senate. That subject was clearly intended to be, as in the House draft, "the lessee or user of such property." This is evident from the title of the act as well as from Section 2, which provides that the taxes shall be assessed to the lessees or users of real property. Thus, the Michigan act provides that it is the users of tax-exempt property who shall be subject to taxation, as contrasted with the Pennsylvania act considered in Allegheny, which provided that certain property should be subject to taxation. In further contract with Allegheny, and stated in the converse of the language therein, the tax at bar is a form of personal taxation and not a tax against the property as a thing—its procedures are more analogous to procedures *in personam* than *in rem*—the power to tax is not predicated upon jurisdiction of the property, but upon jurisdiction of the user—the property is not the subject of the tax and does not stand as security for its payment. These distinctions between Allegheny and the case at bar we think go to the roots of the problem of the nature of the taxes in the two cases and leave the holding in Allegheny that the tax there was on United States property without application here.

In *Educational Films Corp.* v. *Ward*, 282 U. S. 379, the court upheld a New York franchise tax on certain classes of domestic corporations, payable each year in advance and measured by the corporation's entire net income of the preceding year, which, in the case of plaintiff therein, was derived in part as royalties from

copyrights granted by the United States. The court held that, assuming Federal copyrights and income therefrom to be immune from State taxation as instrumentalities of the Federal government, the franchise tax in question insofar as measured by royalties from copyrights was not void as a tax on Federal instrumentalities. In so holding the court said:

> If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise.

Applying the test of the quoted language here, it is plain that Act 189 can have no application independent of Borg-Warner's enjoyment of the privilege of using the real estate in connection with its business conducted for profit, and that the tax is, therefore, not an *ad valorem* tax on real property of United States and void accordingly, but a specific tax on Borg-Warner's privilege of using it and, hence, valid. This squares with the above quoted language from Allegheny to the effect that Mesta enjoyed a right of possession which the court seemed to suggest, without deciding, could be taxed by the State, and the further statement that it had theretofore held that a contractor's personal advantages from the beneficial personal use of United States property may be taxed by a State.

That the economic burden of the tax, as distinguished from its legal incidence, happens to fall on United States is no barrier to its validity. *James* v. *Dravco Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495.

Plaintiffs say, however, that even if Act 189 stated in express terms that it was imposing a specific tax on the privilege of using the immune United States property, still it would be unconstitutional because the full value of the property is used as the measure in assessing the tax, thus evidencing a legislative intent to accomplish indirectly what may not be done directly, namely, to tax property of the United States. In this connection they cite *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *New Jersey Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665; *Missouri* v. *Gehner*, 281 U. S. 313. Plaintiffs say that, however phrased, the act is, in fact, aimed at and intended to reach the property of United States in a manner held invalid in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, and *Miller* v. *Milwaukee*, 272 U. S. 713. We come, then, to the same position confronted by the court in *Educational Films Corp.* v. *Ward*, *supra*, when it said:

> Hence, we pass to the chief objection urged against it, that such a tax, however described, and even though deemed to be a tax on franchises, is invalid so far as it is measured by income derived from a federal instrumentality.

Consider, then, these cases cited by plaintiffs. Involved in the *Pittman* and *Federal Land Bank* Cases were State taxes imposed on mortgages owned by Federal instrumentalities. In the *New Jersey Insurance Company* Case a New Jersey statute was con-

sidered which provided for an intangible personal property tax which in that case had been assessed against tax-exempt United States bonds held by a domestic corporation, the court pointing out that the tax was not considered by the New Jersey legislature or taxing authorities as a privilege or franchise tax. Likewise, in *Missouri* v. *Gehner* the tax was on net assets of insurance companies, including exempt United States bonds held by them. In *Miller* v. *Milwaukee* the Wisconsin statute involved required a Wisconsin corporation to pay a tax on its income, excepting the portion thereof received from United States bonds. The income was later distributed as dividends to stockholders. The Wisconsin statute taxed the stockholders on such dividends only to the extent that they represented income of the corporation derived from tax-exempt United States bonds. The court held the tax on stockholders to that extent void because it was aimed solely at exempt income from United States bonds. The *Macallen* Case presented an amendment to a State taxing act which was held invalid because its sole purpose was to reach income from tax-exempt United States bonds. In none of these cases was the object of the tax nor the legislative purpose sought to be served the same as at bar. As defendant in the instant case properly points out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon either by direct payment thereof under lease requirements or by payment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and elim-

inating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally. It is obvious that each of the cases cited by plaintiffs, as just above considered, is distinguishable from the instant case because in each of them either a local tax was sought to be imposed directly on immune property or income as such, or the sole purpose of the tax act was to reach it indirectly, whereas here, as previously considered, the tax is not on the immune property but on the privilege of using it, and the act imposing it is not aimed at that property but, rather, at removing a discrimination between users of private and of public property. That such a privilege tax is not only permissible, as appears from the *Allegheny* and *Educational Films* Cases above considered, but that it is valid even though measured by the full value of the immune property or income is settled by *Plummer* v. *Coler*, 178 U. S. 115; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Educational Films Corp.* v. *Ward*, *supra*; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pacific Co.* v. *Johnson*, 285 U. S. 480. In *Plummer* a State inheritance tax was upheld even though measured by the full value of tax-exempt United States bonds included in a bequest. In *Home Insurance Company* the court upheld a corporate franchise tax measured by the corporation's dividends and capital stock, including the full value of tax-exempt United States securities held by the corporation. In *Flint* and in *Pacific* corporate franchise taxes were upheld which were measured by income derived in part from tax-exempt United States securities. In *Educational Films Corp.*

v. *Ward, supra,* the court upheld a corporate franchise tax measured by immune income from Federal copyrights. In each of these cases the privilege tax was held valid despite use of a measure which included the full value of immune property or income.

Plaintiffs also urge that Act 189 violates Mich. Const. 1908, art. 10, Sec. 7, in imposing against a lessee an *ad valorem* tax not based on the cash value of his leasehold but of the entire fee simple interest of the owner. Holding, as we do, that the tax imposed is not *ad valorem* on the property nor on the leasehold, but a specific tax on the privilege of using the property, the mentioned constitutional provision is without application. *Shivel* v. *Kent County Treasurer,* 295 Mich. 10. See, also, *Walcott* v. *People,* 17 Mich. 68, and *Kitson* v. *Ann Arbor,* 26 Mich. 325.

Affirmed, with costs to defendant.

Justice Reid took no part in this decision.

CIRCUIT COURT OF WAYNE COUNTY

[Caption omitted]

OPINION

This is an action to recover a tax of $6,161.75 paid under protest. The case was submitted, principally on an agreed statement of facts, on April 28th last, on principal briefs to be furnished within 30 days, and reply briefs 15 days later. Defendant's brief was furnished to the Court more than two months ago, but none has been received from plaintiffs, although last promised for not later than August 20th. Under the circumstances the Court does not feel justified in delaying decision further, especially since the reasoning of defendant's brief, and the cases cited in support thereof, seem determinative of the issues.

The assessment in question was made under authority of Act 189, P. A. 1953, being C. L. 1948 Supp. 211.181–2, against plaintiff Borg-Warner, lessee of the owner, plaintiff United States. Plaintiffs claim the statute to be unconstitutional as an indirect attempt to tax property of the United States. Defendant denies this claim, and also moves that the action be dismissed because plaintiffs have not exhausted their administrative remedies under state and city laws. Defendant has indicated, however, that while it is not waiving this point, it would prefer to have decision rested on the fundamental issue of the validity of the tax.

The assessment in question was measured by the valuation of that portion of improved real property at 11111 French Road in Detroit which was occupied by Borg-Warner and used by it exclusively for manufacturing purposes in its business conducted for profit, its interest being that of a lessee.

The lease was dated August 14, 1950, effective as of March 8, 1948. By amendment dated March 3, 1954, dated as of December 1, 1952, the lease was extended for a further term of five years from March 8, 1953, at an increased rental, and permitting Borg-Warner to take credit for any taxes assessed against it under the Act in question. In this manner, the "economic burden" of the tax is claimed to be placed on the United States. Defendant takes the position that the statute authorizes a non-discriminatory tax which is not in violation of the constitutional principles mentioned.

The material portions of Act 189 provide:

> When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for

> profit, * * * shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner * * *.
>
> Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property.

It is true that in the first provision quoted, the meaning is not completely clear, obviously because, in the process of going through the legislation "mill" the words "the lessee or user of such property" were accidently dropped in recopying, instead of appearing just before the words "shall be subject to taxation" after the asterisks above. The meaning and purpose is nevertheless clear from the enactment as a whole.

It would serve no necessary purpose to analyze and quote from the decisions which I consider controlling and determinative of the issues upon which the case turns. In my opinion they justify the following conclusions:

The "incidence" of the tax falls not upon the United States, but upon plaintiff Borg-Warner, and the tax is not invalid because indirectly the "economic burden" falls upon the United States; the tax is not one upon the real estate, but upon the user; the tax is not discriminatory; it does not adversely affect any "sovereign power"; it creates no liability against the United States or any of its agencies or instrumentalities.

Some of the authorities supporting these conclusions are:

Federal Reserve Bank v. *Revenue Department*, 339 Mich. 587.

National Bank of Detroit v. *Department of Revenue*, 340 Mich. 573 (Appeal dismissed in U. S. Supreme Court May 23, 1955).

In re Fish's Estate, 219 Mich. 369.

Oklahoma Tax Com. v. *Texas Co.*, 336 U. S. 342.

Federal Compress & Warehouse Co. v. *McLean*, 291 U. S. 17, 78 L. Ed. 622.

Colorado Nat. Bank v. *Bedford*, 310 U. S. 11, 84 L. Ed. 1067.

Annotation 23 A. L. R. 248.

Union Trust Co. v. *Probate Judge*, 125 Mich. 487.

Federal Land Bank v. *Bismarck*, 314 U. S. 95, 86 L. Ed. 65.

Esso Standard Oil Co. v. *Evans*, 345 U. S. 495, 97 L. Ed. 1174.

It follows that the tax is valid, and defendant is entitled to a Judgment of No Cause of Action, with costs to be taxed.

I am also of the opinion that in any event, the motion to dismiss on the ground that plaintiffs have not exhausted the administrative remedies before bringing this suit is supported by the authorities. However, if the decision on the issue of validity is correct, it is not necessary to be further concerned about this point.

/S/ HERMAN DEHNKE,
Circuit Judge, Presiding by Assignment.

Dated: August 23, 1955.

JUDGMENT OF THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

(Filed August 25, 1955)

At a session of the Circuit Court for the County of Wayne held at the Court House, in the City of De-

troit, on the 25th day of August, 1955, Honorable Herman Dehnke, Circuit Judge.

The parties being again present, the Court heard the conclusion of the testimony, the arguments of counsel and finds that the defendants did not undertake and promise as the plaintiffs have complained against them.

Therefore, it is adjudged that the plaintiffs take nothing by their suit and that the defendants recover their costs to be taxed, and have execution therefor.

/s/ HERMAN DEHNKE,
Circuit Judge.

JUDGMENT OF THE SUPREME COURT OF MICHIGAN

(Filed May 14, 1956)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourteenth day of May, in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
EDWARD M. SHARPE,
TALBOT SMITH,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

[Caption omitted]

The records and proceedings in this cause having been brought to this Court by appeal from the Circuit

Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiffs, its costs, to be taxed, and that it have execution therefor.

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No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (DETROIT GEAR DIVISION), APPELLANTS

v.

CITY OF DETROIT, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Circuit Court of Wayne County, Michigan (R. 38–40), is not reported. The opinion of the Supreme Court of Michigan (R. 49–56) is reported at 345 Mich. 601.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on May 14, 1956. (R. 57.) A notice of appeal was filed by appellants United States and Borg-Warner Corporation on August 9, 1956. (R. 57–59.) On January 14, 1957, this Court noted probable jurisdiction. (R. 99.) The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C., Section 1257.

QUESTION PRESENTED

The City of Detroit has assessed and collected taxes from a lessee of the United States (Borg-Warner) pursuant to a state statute which directs that taxes shall be collected from a lessee or user of tax-exempt realty "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso in the statute creates an exception should the United States make an equivalent payment in lieu of these taxes. The statute further provides that the taxes shall constitute a debt of the lessee or user to the locality but shall not become a lien against the property.

The question presented is whether this statute, on its face and as here applied, is unconstitutional in that it invades the immunity of federal property from taxation by the states.

STATUTES INVOLVED

Michigan Public Act 189 of 1953 and excerpts from the Military Leasing Act of 1947 are set forth in the Appendix, *infra*, pp. 29–33.

STATEMENT

1. *The litigation.*—This is an action to recover taxes levied under the authority of Michigan Public Act 189 and paid to the City of Detroit by Borg-Warner Corporation under protest.

For some years, the United States has owned a Naval Industrial Reserve Plant consisting of an industrial plant, buildings and grounds located at 11111 French Road, Detroit, Michigan. (R. 31, 61–62.) Under a negotiated lease agreement dated August 14,

1950, and effective as of March 8, 1948, Borg-Warner leased from the Government a portion of the Naval Industrial Reserve Plant. (R. 61–87.)[1] As recited therein, the lease was made under the authority of the Act of Congress of August 5, 1947, c. 493, 61 Stat. 774, and with the approval of the Armed Services Committees of the Congress. (R. 62.)

The lease was for a five-year period ending March 7, 1953, unless sooner terminated. Borg-Warner had an option to extend the term for three additional terms of five years each upon certain conditions. (R. 65.) By amendment dated March 3, 1954, effective as of December 1, 1952, the lease was extended for the further term of five years from March 8, 1953. (R. 91–95.)

On June 10, 1953, Public Act 189, Michigan Public and Local Acts (1953), p. 252, entitled "AN ACT to provide for the taxation of lessees and users of tax-exempt property" (Appendix, *infra*, pp. 29–30), became effective. The amendment to the lease provided that, effective March 8, 1954, and thereafter, Borg-Warner should deduct from its semi-annual rental payments to the Government any taxes assessed against Borg-Warner on account of Public Act 189. At the same time, the Government reserved the right to contest the legality of Public Act 189. Borg-Warner agreed to cooperate with the Government in any litigation, pay taxes under Public Act 189 under protest, and turn over to the Government any such taxes recovered through litigation. (R. 93.)

[1] The details of the lease are set forth *infra*, pp. 5–9.

As of January 1, 1954, a tax was assessed against Borg-Warner under the authority of Public Act 189. (R. 31.) Pursuant to the requirements of the Act, the Board of Assessors of the City of Detroit valued the entire portion of the Naval Industrial Reserve Plant leased by Borg-Warner precisely as it would have done had such real property been owned in fee simple and occupied by Borg-Warner. The value of the real estate thus determined was $352,060. (R. 32–33.) Such valuation was set down upon the personal property tax rolls of the City of Detroit (R. 97), and a tax bill, characterizing the subject of the tax as personal property (R. 2, 11, 14), was issued to Borg-Warner (for the year 1954) in the amount of $12,323.50, a sum more than 3.5% of the assessed valuation. The Board of Assessors did not determine, nor was the tax based upon, the cash value of the right to use and occupy the portion of the Naval Industrial Reserve Plant leased to Borg-Warner by the United States. (R. 33–34.)

On August 16, 1954, Borg-Warner paid $6,161.75, representing the first half of the 1954 tax, to the Treasurer of the City of Detroit under protest. (R. 2–3, 11, 14.)

On September 14, 1954, appellants, as co-plaintiffs, filed an action in the Circuit Court of Wayne County for refund of the taxes paid. (R. 1–9.) It was alleged that Act 189 was repugnant to the Constitution of the United States in that it authorizes a tax upon property owned by the United States, infringes the sovereign immunity of the United States, and violates

the Fourteenth Amendment to the Constitution. (R. 5–8.)[2]

The case was presented upon stipulated facts and documentary evidence to the Circuit Court of Wayne County (R. 28–29), which entered judgment against appellants. The Supreme Court of Michigan affirmed, holding that the levy is a form of personal taxation, that it is imposed only upon the privilege of using property, and that it is not a tax against property. (R. 52, 56.) This appeal followed.

2. *The terms of the lease and the amendment thereto.*—As stated in the lease, the United States owns, and the Department of the Navy has custody and control of, the Naval Industrial Reserve Plant.[3] The Secretary of the Navy had determined that the plant, although not surplus, was not, for the time being, required for public use and that it was in the public interest to lease it to Borg-Warner under certain conditions. (R. 61–62.)

All of the plant, with the exception of an office building and passageway, is covered by the lease and is described therein as the "Facilities". The facilities include a manufacturing area and a storage area. (R. 64.) Borg-Warner is granted the right to use the manufacturing area "in its operations for the manufacture of automotive parts, agricultural implements and similar products and for no other purpose". (R. 66.) The lessee assumes the obligation

[2] There is no challenge to the valuation figure which the Board placed upon the fee.

[3] The lease and the amendment thereto are printed at R. 61–89, 91–95.

to execute the Government's directions for removal of all Government-owned machine tools, equipment and materials from the manufacturing area and for the storage of all such property in the storage area. Borg-Warner is permitted to use the storage area "for the storage and maintenance of Government-owned machine tools, equipment and material and for no other purpose". (R. 65–66.) The Government retains the right of access to the facilities for any purpose not inconsistent with the proper use of the facilities by Borg-Warner. (R. 65.)

Borg-Warner accepted the status of the Naval Industrial Reserve Plant as a standby facility against a national emergency and undertook to maintain it at all times so as to permit prompt reactivation for the manufacture of ordnance material. It agreed further that it would "not perform any acts other than in accordance with the terms of this lease, which might be harmful to or reduce or impair such status." (R. 66.)

The lease provides for a first-year rental of $20,400 and $2,400 per year thereafter, plus 54½ cents per year for each square foot which might later be added to the manufacturing area by removal of Government-owned materials from the storage area. (R. 66–67.) In addition, Borg-Warner is obligated to protect, preserve, maintain and repair the facilities and the Government-owned machine tools, equipment and materials in accordance with reasonable directions or requirements. The lease authorizes the Government to require expenditures by Borg-Warner for this maintenance and repair up to a maximum of $43,600

during the first year, $47,600 during the second year, and $45,600 during the third and succeeding years. In addition, Borg-Warner is to provide janitorial services for the storage and manufacturing areas and to carry insurance upon the facilities (not including, however, the Government-owned machinery, machine tools and equipment in the storage area). (R. 67–68, 70–72.)

The lease provides for termination by the Government in the following contingencies: (a) upon the declaration of a national emergency by the President or the Congress; (b) upon 120 days' notice by the Secretary of the Navy in the interests of national defense; (c) following a determination that the Naval Industrial Reserve Plant is surplus to the further needs of the Government and notice by Borg-Warner that it does not desire to exercise its right of first refusal; (d) upon 20 days' notice in the event of default by Borg-Warner in the terms of the lease (except where the default is due to certain enumerated causes beyond the control of Borg-Warner). (R. 73–75.)

Upon expiration or termination of the lease, Borg-Warner is obligated to replace and reinstall in their original positions all Government-owned machine tools, equipment and material, as required by the Government. (R. 80–81.)

Neither the lease nor any interest therein may be transferred or assigned by Borg-Warner except upon consent of the Government. (R. 84.)

All disputes concerning questions of fact arising under the lease are ultimately to be decided by the

Secretary of the Navy, whose decision is to be final and conclusive upon the parties. (R. 85.)

The lease further provided that (R. 78):

> In the event that as a result of any future Act of Congress subjecting Government-owned property to taxation, taxes, assessments, or similar charges are imposed by state or local authorities upon the property leased hereunder (other than upon Borg-Warner's possessory interest therein), Borg-Warner shall pay the same when due and payable and this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided for herein, which reduction shall not be greater than the amount of such taxes, assessments, or similar charges * * *.

The terms of the lease were subject to renegotiation upon renewal. (R. 69.)

Borg-Warner gave notice of its election to extend the original term for an additional period of five years and some of the provisions of the lease were renegotiated resulting in an amendment entered into as of December 1, 1952. (R. 91.)

The amendment extended the term of the lease for a period of five years commencing March 8, 1953, and ending March 7, 1958, unless sooner terminated. Borg-Warner also agreed to heat, at its own expense, the spaces which had been retained by the Government. In addition, Borg-Warner agreed to pay, upon execution of the amendment, additional back rent for the five-year term ending March 7, 1953, in the sum of $44,966.64, that amount representing the unex-

pended portion of the maximum yearly maintenance sums agreed upon for that period. Future rent was fixed at $24,000 per year for the five-year period ending March 7, 1958. (R. 92–93.) Maximum maintenance expenses for the new five-year period were set at $35,000 per year. (R. 94.) The amendment contained the following clause (R. 93):

> *Provided, further,* that, effective March 8, 1954, and throughout the remaining term of the extended lease, Borg-Warner shall deduct and pay from the stipulated semi-annual rental installments any taxes assessed against it under the provisions of Public Act 189 of the State of Michigan for the year 1953 or other taxation statutes coming into effect during the extended term of the lease and which attempt to tax Borg-Warner on the basis of the assessed value of the Facilities leased to it or on the basis of the value of its leasehold interest therein or for any other reason because of its use and occupancy of the same under this lease. Borg-Warner will pay the personal taxes assessed against its own property located in said Facilities. The Government reserves the right to contest the legality of said Public Act 189 or any other of such described taxation statutes coming into effect during the extended term of the within lease, and, should it successfully do so, Borg-Warner shall repay to the Government any taxes actually refunded by such determination. Borg-Warner agrees to cooperate with the Government in respect to such possible litigation, including the payment of such taxes under protest, if so required by the Government.

SUMMARY OF ARGUMENT

1. Since *McCulloch* v. *Maryland*, 4 Wheat. 316, it has been settled constitutional doctrine that property of the United States is beyond the taxing power of the states. This does not mean that non-discriminatory taxation of those with whom the Federal Government chooses to deal (*e. g.*, contractors or suppliers) is invalid merely because there may be an indirect economic effect upon the Government—an effect stemming from the fact that some or all of the tax might be passed along to the Government as consumer. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, in which the United States supported the constitutionality of the state tax levied upon the contractor.

While decisions in this area often involve close and difficult questions, the cases make clear, at a minimum, that a direct imposition on federal property must fail, and that "special legislation" calculated or designed to reach federal property is to be condemned. In making its determination whether a state tax violates the federal immunity, this Court will look to substance, not merely to form and nomenclature; and it will not be bound by the state court's characterization of the tax. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368. Particularly, the Court will be mindful that "[a]ctual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes", and that typically the attempt to levy upon federal property is made by assessing the party through whom the Government is acting. *United States* v. *Allegheny*

County, 322 U. S. 174, 187–188. A line must be drawn between a tax which is aimed at the property or gains of those who deal with the Government and a tax which levies upon Government property in private hands. *Id.*, pp. 186–189.

2. Applying these principles, it is evident, from the language and operation of Michigan Act 189, that the statute is invalid, both because the levy which it commands is a direct imposition upon federal property and because it is "special legislation" peculiarly designed to have this effect.

There is no question that Michigan could tax Borg-Warner's separate interest in the leasehold which it holds from the Government. If consent to that were needed, Congress has explicitly granted it in the Military Leasing Act of 1947 (Appendix, *infra*, pp. 30–33). Michigan has refused, however (as did Pennsylvania in the *Allegheny County* case, *supra*), to separate the interest of the lessee from the Governmental interest. Its statute directs that, in the case of a lessee of tax-exempt property, there shall be a tax "in the same amount and to the same extent as though the lessee or user were the owner of such property." The assessors have proceeded accordingly and have collected a tax from the lessee admittedly based upon the entire value of the fee.

However this tax be denominated—as an *ad valorem* property tax (as we believe it in essence to be) or as a tax on "the privilege of using the real estate" (the characterization of the Supreme Court of Michigan)—it is unquestionably measured by values which are inherent in the United States by virtue of its

ownership of the fee (cf. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 499), and it is imposed upon those values to the direct detriment of the United States. The key to the tax is the way it works. Michigan collects from the Government's lessee of improved property the same amount whether he has a short-term lease subject to numerous contingencies or a 999-year lease without restriction. And, in either event, it collects the same amount as it would collect from a private owner of a fee of equivalent value. Even if one were to ignore the realities and look merely to the fact that this tax is, in form, a tax upon the lessee, the scheme would be unconstitutional since the conclusive presumption which it invokes—that the interest of the lessee is tantamount to the value of the fee—is wholly arbitrary.

It is no answer that collection is from the lessee. "Rarely does a state or municipality pursue the Federal Government itself." *Allegheny County* case, 322 U. S. at 188. Nor is it significant that the taxing statute forswears a lien upon the property. "[R]enunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being ta.. d." *Id.*, p. 187.

If the operation of the statute permitted any doubt of its character, the proviso clause would dispel it. Michigan forgives the tax, ostensibly a tax upon the lessee for the privilege of holding the property, if the Federal Government makes an equivalent payment. One could not ask for plainer articulation of the underlying purpose. This "statute must fail even if but for its purpose or special operation it would be

perfectly good." *Miller v. Milwaukee*, 272 U. S. 713, 715.

The opinion of the Supreme Court of Michigan in a companion case (pending before this Court as Nos. 37 and 38, this Term) suggests that Act 189 is being sustained by that court because it is deemed fair to require contribution by the United States in respect of federal property situated in the State. The short answer is that our constitutional system "leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests." *Allegheny County, supra*, 322 U. S. at 191. It is appropriate to add, however, that the Congress, by various statutes, has undertaken to accord limited waivers of immunity, to make payments in lieu of taxes, to confer outright grants in aid and to enter revenue-sharing arrangements. It is estimated that federal assistance to states and localities will exceed 5.5 billion dollars in fiscal 1958. The adequacy or inadequacy of the federal program—a complex question, indeed—is not a matter for determination by the courts, either state or federal; the adjustment of the "benefits and burdens" which result from the presence of federal property and activities "is for other departments." *Id.*, p. 190.

ARGUMENT

I

PROPERTY OF THE UNITED STATES IS IMMUNE FROM LOCAL TAXATION

The doctrine of implied governmental immunity goes back to *McCulloch* v. *Maryland*, 4 Wheat. 316.

As the Court there declared, the supreme sovereignty of the Federal Government within its sphere is clear, as are its right to utilize means of its own choosing in carrying out its delegated powers and the right of its properties, functions and instrumentalities to be free of state interference occasioned by the exercise of the latter's taxing powers. The Court "never has departed from that basic doctrine or wavered in its application." *United States* v. *Allegheny County*, 322 U. S. 174, 176. Its decisions in *Mayo* v. *United States*, 319 U. S. 441, *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 561–562, 566–567, and *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 117–118, show the undiminished vigor of this principle, from which it follows that the tax in controversy cannot stand if (as we shall urge) it is actually levied on Federal property.

Since *James* v. *Dravo Contracting Co.*, 302 U. S. 134, in which the United States supported the constitutionality of the state tax involved, it has also been settled that non-discriminatory state taxation of those with whom the Federal Government chooses to deal (*e. g.*, contractors or suppliers) does not interfere "in any substantial way with the performance of federal functions" (p. 161) merely because there may be indirect economic effect, *i. e.*, passing some or all of the tax along to the Government as consumer. See *Alabama* v. *King & Boozer*, 314 U. S. 1, 8–9; cf. *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, 347 U. S. at 118–119. If, however, the burden on the Government is substantial and direct, the tax is not saved from

invalidity because the state has adopted procedures to assess against, and collect from, those with whom the Government deals, rather than the Government itself. A tax may not be nominally imposed upon private persons to accomplish the collection of a tax against the United States which could not otherwise be levied. *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643, 645. And special legislation aimed at federal property is, of course, invalid. *Miller* v. *Milwaukee*, 272 U. S. 713.

Of the many cases upholding federal immunity from state taxation, only two (*Clallam County* v. *United States*, 263 U. S. 341, and *Mayo* v. *United States*, *supra*) involved attempts to collect taxes or fees directly from the United States. Typically, the local authority has proceeded against a private person, asserting the tax to be one levied upon him or upon his private property. *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *United States* v. *Rickert*, 188 U. S. 432; *Irwin* v. *Wright*, 258 U. S. 219; *United States* v. *Allegheny County*, *supra*; *S. R. A., Inc.* v. *Minnesota*, *supra*.[1] But neither form nor nomenclature is controlling over substance. As the cited cases establish, if the levy is in substance a direct imposition upon the Federal Government or its property—if, otherwise stated, the Government is the

[1] Other cases invalidating tax assessments against third persons are: *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Sargent* v. *Herrick*, 221 U. S. 404; *Hussman* v. *Durham*, 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 609.

real taxpayer—the tax must fail, even though the state has confined itself (for obvious reasons) to proceedings against a private person.[5]

Those cases which have allowed state taxation despite the claim of implied immunity (*James* v. *Dravo Contracting Co., supra; Alabama* v. *King & Boozer, supra; Curry* v. *United States*, 314 U. S. 14; *Wilson* v. *Cook*, 327 U. S. 474; *S. R. A., Inc.* v. *Minnesota, supra; Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495) rest upon the conclusion that the tax in question was one based upon the private person's individual gain or advantage, whether obtained by way of receipts, profits, privilege or ownership. In brief, non-discriminatory taxes have been upheld when applied to persons who sought immunity "*for their property or gains* because they are engaged in operations under a government contract or lease." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 363; emphasis added. As the Court stated it in *United States* v. *Allegheny County*, 322 U. S. 174, 186: "* * * what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands."

In the *Allegheny County* case, the State of Pennsylvania, administering an ordinary and non-discriminatory property tax, sought to include in an assess-

[5] In other contexts as well, the Court has recognized that "[t]he person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford*, 310 U. S. 41, 52.

ment of a contractor's property Government-owned machinery possessed by the taxpayer under a lease. This Court held (p. 189) that "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." As the Court has more recently stated, also in a case involving a bailee of federal property, a tax measured by the worth of federal property would be void. *Esso Standard Oil Co. v. Evans, supra,* 345 U. S. at 499.[6]

II

MICHIGAN ACT 189, ON ITS FACE AND AS HERE APPLIED, RESULTS IN A DIRECT IMPOSITION OF TAX UPON FEDERAL PROPERTY. IT IS ALSO "SPECIAL LEGISLATION" DIRECTED AT FEDERAL PROPERTY.

Michigan Act 189, Section 1 (Appendix, *infra,* p. 29), provides (with exceptions not here pertinent) that when any real property exempt from taxation is leased to a private person there shall be a tax "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso adds that this "shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed * * *." In short, Section 1 makes the private *lessee* of federal property liable for such tax as a non-exempt *owner* of such property would be required to pay, but permits the avoidance of such tax

[6] See, also, *Grumman Aircraft Eng. Corp. v. Board of Assessors of Town of Riverhead,* 2 N. Y. 2d 500, petition for certiorari pending, No. 136, this Term.

if the Federal Government makes an equivalent contribution.

Section 2 of the Act provides (Appendix, *infra*, pp. 29–30) that taxes "shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property."[7]

Acting under the mandate of the state statute, the Board of Assessors of the City of Detroit has valued the Naval Industrial Reserve Plant in precisely the same manner as it would have done had the plant been owned by Borg-Warner,[8] and Borg-Warner has paid (under protest) precisely the same taxes it would have been required to pay if it had been in fact the owner. The ultimate question, then, may be simply stated:

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[7] While the taxing statute here involved relates to realty, there would be no reason, if it is constitutionally valid, why similar taxes could not be imposed by the states upon personal property of the United States in private hands. For an indication of the extent of such property, see *United States* v. *Allegheny County*, *supra*, 322 U. S. at 189.

[8] No consideration was given to the five-year term subject to prior termination upon the happening of any of a number of enumerated events (R. 73–75) and subject to renegotiation upon renewal (R. 69). No consideration was given to the qualifications upon the right to use the manufacturing area, or to the prohibition against use of the storage area except for storage of Government-owned material. (R. 66.) No attempt was made to evaluate the substantial obligations of protection, preservation, maintenance, and repair of the Government-owned material and facilities. (R. 67–68.) Here, as in the *Allegheny County* case (322 U. S. at 187), "[t]he full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in [the] assessment."

Has Michigan taxed interests in property which are owned by the Federal Government?

It should be stressed at the outset that there is no question in this case as to whether Michigan might undertake to appraise the value of Borg-Warner's interest in the leasehold and to impose a tax upon that separable interest.[9] If, under prior law, any valid claim of immunity could have been asserted for that narrowly circumscribed interest, Congress expressly waived it by the Military Leasing Act of 1947 (Appendix, *infra*, pp. 30–33), Section 6 of which makes the lessee's interest (but only the lessee's interest) subject to state or local taxation.[10] As was true of Pennsylvania in the *Allegheny County* case, Michigan here has not attempted to draw any line between the Government's interest as owner and the possessor's interest as lessee.[11] Michigan's position necessarily stands or falls on the bare proposition that it can collect from a private lessee of federal property precisely the same quantum of tax, measured by full value of the fee, as it would collect from a non-exempt owner of a fee having an identical value.

As numerous divided decisions of this Court attest, close and difficult questions are often presented when one seeks to determine the incidence of a tax or the burden of a tax. But certainly (see discussion, *supra*,

[9] The question whether a purely personal beneficial interest in Government-owned property could be accurately valued and taxed to a private person in possession of such property was reserved in the *Allegheny County* case (322 U. S. at 186).

[10] This section was considered and provided the basis of decision in *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253.

[11] See note 8, *supra*.

pp. 13–17) the Court's decisions bear out, at a minimum, that there can be no direct imposition of a tax upon federal property,[12] and that the Court will strike down any tax which is special or discriminatory in the sense that it is one calculated to destroy the immunity of the Federal Government.[13] So viewed, this case is not a close one. Both the effect and the purpose of the statute are such that it is patently invalid.

The language and the operation of the statute make it unmistakably plain, on the face of it, that this is a tax which reaches, and is calculated to reach, the entire Governmental interest and not merely such interest as may be in the lessee. This may be illustrated by posing three hypothetical cases involving three identical pieces of improved property. Let us assume that each parcel of property consists of land and an office building with a life expectancy of 75 years, and that each has an appraised value of $1,000,000. Property "A" is both owned and occupied by a private corporation. Property "B" is owned by the United States and leased for 75 years to a commercial tenant, with no restrictions upon the tenant and no right in the United States to terminate before lease expiration. Property "C" is owned by the United States and leased to a tenant for a term of 5 years, subject to numerous restrictions on the tenant. Under Michigan law, the tax would be exactly the same for the owner of "A" and for the lessees of "B" and "C", *i. e.*,

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[12] *Mayo* v. *United States*, 319 U. S. 441; *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

[13] *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738, 840–841; *Miller* v. *Milwaukee*, 272 U. S. 713.

$1,000,000 multiplied by the applicable tax rate. There is thus no escape from the conclusion that the tax, in essence, is one on the whole of the property. Obviously, the interest of the short-term lessee of "C" is insubstantial as compared to the interest of the long-term lessee of "B" (who would have for 75 years the continued use of the office building) and even less substantial as compared to the interest of the owner of "A". Yet the tax, which, under the statutory requirements, is measured by the value of the fee, is identical in all three cases.

Pointing to the title of Act 189 ("Taxation of lessees and users of tax-exempt property; exception"), to the provision that the tax shall be assessed to the lessee or user and to the further provision that the tax shall not become a lien against the property, the Supreme Court of Michigan has characterized the tax as "a form of personal taxation" (a tax on "the privilege of using the real estate") and the procedures for collection as "more analogous to procedures *in personam* than *in rem*". (R. 52–53.) This Court, however, is not bound by the nomenclature of the tax or by the state court's characterization; in order to ascertain whether there is an invasion of federal immunity, it must determine for itself the nature and effect of the levy. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443; *United States* v. *Allegheny County*, *supra*, 322 U. S. at 184; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, 347 U. S. at 121–122.

The scheme of Act 189—that the tax upon the pri-

vate lessee of tax-exempt property shall be the same as if he were the owner—makes it transparently clear, we believe, that this is not a tax restricted to the interest of the lessee (or to the value of the lessee's "privilege") and that it invades the federal immunity. It may be added that, even if viewed as a tax upon the lessee, the statute would suffer from a constitutional infirmity, for it invokes a conclusive presumption which is wholly arbitrary and must fall under the Fourteenth Amendment:[14] the presumption that the bundle of rights enjoyed by a lessee of tax-exempt property has the same value as the fee itself.

Conceivably, one might denominate any ordinary "property" tax as a "privilege" tax. A property interest is ordinarily regarded as an aggregation of rights and privileges possessed by the owner. So viewed, a so-called tax on property is virtually indistinguishable, as a conceptual matter, from a tax on the privilege of holding the property. The question here, of course, is not one of names but of substance—whether, in fact, the imposition is one which falls upon values owned by the United States. It seems undeniable, as we have pointed out above, that it does, since the tax collected from the Government's lessee is precisely the same as upon a private owner of a fee having equivalent value.[15]

The conclusion that the tax here (however it be denominated) is in essence the same as the ordinary

[14] See *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Hooper* v. *Tax Commission*, 284 U. S. 206. Cf. *Heiner* v. *Donnan*, 285 U. S. 312.

[15] It is equally clear that the monetary burden is on the

ad valorem property tax which Michigan levies upon non-exempt property is scarcely altered by the fact that Michigan proceeds, for purposes of collection, against the lessee. The numerous cases in which this Court has held that there was an invasion of federal immunity have typically taken that form. See *supra*, p. 15. "Rarely does a state or municipality pursue the Federal Government itself." *United States* v. *Allegheny County, supra*, 322 U. S. at 188. Moreover, it should be noted that it is familiar practice in Michigan (and elsewhere) to collect ordinary property taxes (both on realty and personalty) from either the owner or from the occupier or user.[16] Col-

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United States and not on Borg-Warner. Article 1f of the original lease provided (R. 78):

> In the event that as a result of any future Act of Congress subjecting Government-owned property to taxation, taxes * * * are imposed by state or local authorities upon the property leased * * *, Borg-Warner shall pay the same * * * and this lease shall be renegotiated so as to accomplish an equitable reduction in the rental * * *.

In addition, following the enactment of Act 189, the lease was renegotiated (R. 91) to provide for the deduction from the rental to the Government of taxes paid by Borg-Warner under the Act. (R. 93.)

Apart from the specific provisions in the contract between the United States and Borg-Warner, it is plain, in all events, that the rental which property will yield when leased depends directly on the extent of the liabilities which the lessee will incur.

[16] Sec. 211.3, C. L. Mich. 1948 (Mich. Stats. Anno., 1950 Revision, § 7.3) provides:

> Real property shall be assessed * * * to the owner if known, and also to the occupant, if any; if the owner be not known, and there be an occupant, then to such occupant, and either or both shall be liable for the taxes on said property, * * *.

See *Engineering Society* v. *Detroit*, 308 Mich. 539, 550–551.

The state may similarly collect a tax on personal property

lection from the user (if that course be adopted) makes the tax no less a tax upon the property of the owner. Indeed, the user may make himself whole by proceeding, in turn, against the owner.[17]

Nor is it significant that Section 2 of Act 189 carefully renounces a lien against the exempt real estate. "* * * [R]enunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed." *Allegheny County* case, *supra,* 322 U. S. at 187.

What has been said above as to the operation of this taxing statute not only requires the conclusion that this levy is a direct imposition upon federal property; it shows no less that the legislation was specially aimed at such property. Only lessees or users of tax-exempt property are taxed by the pertinent provisions of Act 189. And they are taxed not on the basis of their interests, but on the basis of the values of the fees which they occupy. As this Court pointedly stated in *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 629: . . .

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from a tenant or person in possession, in which event such person has a specific statutory right to recover from the owner for whose benefit the tax was paid. Sec. 211.44, C. L. Mich. 1948, as amended (Mich. Stats. Anno., 1955 Cum Supp. § 7.87); Sec. 211.47, C. L. Mich. 1948 (Mich. Stats. Anno., 1950 Revision, § 7.91).

[17] From an early date, the Michigan Supreme Court has taken the view that an occupant of real property who has paid the taxes thereon is entitled to offset the amount so paid as against rentals due the owner. *Taylor* v. *Roniger*, 147 Mich. 99, 105. This rule has been codified in Sec. 211.53, C. L. Mich. 1948 (Mich. Stats. Anno., 1950 Revision, § 7.97). As to a user who has paid taxes on personal property, see note 16, *supra.*

> The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach.

There is further eloquent testimony of this statute's purpose—the proviso clause of Section 1, which states in substance that the tax (though it is ostensibly upon the lessee) will be forgiven if the United States makes a payment "equivalent" to the tax. Michigan itself has thus recognized that under Act 189 the United States is the real taxpayer. The case, we submit, is one falling squarely within the doctrine of *Miller* v. *Milwaukee*, 272 U. S. 713 (involving a statute which sought to reach, by indirect means, exempt income from United States bonds): "the statute must fail even if but for its purpose or special operation it would be perfectly good" (p. 715).[18] See, also, *Packard Motor Car Co.* v. *City of Detroit*, 232 Mich. 245.

In the companion case of *Continental Motors Corp.* v. *Township of Muskegon*, Nos. 37, 38, this Term, the Supreme Court of Michigan stated (346 Mich. 218, 255) that Act 189 is legislation which seeks "equality in the sharing of burdens and benefits of local government."

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[18] It is no answer to suggest that the statute is broad enough to permit imposition of the tax upon those who lease from the State of Michigan. When Michigan taxes its own lessees, it takes money from one pocket and places it in the other. For to the extent that it taxes the lessee, there is a *pro tanto* reduction in the amount of rental that it can command in the market as lessor. When Michigan taxes values owned by the United States, the United States suffers direct loss. And, of course, Michigan cannot, in any event, insist upon a waiver of immunity by the United States, however it may choose to deal with property leased from the State.

At bottom, this seems to be an assertion that it is fair to require contribution by the United States in respect of federal property situated in the State. The short answer is that our constitutional system "leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests." *Allegheny County* case, *supra*, 322 U. S. at 191.

It is also appropriate to observe, however, that the Congress has made, and is constantly in the process of making, extensive provision for contribution to the costs of state and local government. It has enacted legislation authorizing, in certain circumstances, that various departments and agencies of the Government make payments in lieu of taxes to localities where federal property is situated. The sum authorized is not always equivalent to the amount which might have been assessed had the property been privately owned. Congress, in some instances, has provided that benefits accruing to the state or local government by reason of the federal activity be considered in arriving at the payment to be made.[19] In other instances, Congress has provided that federally-provided services for the maintenance of its property be taken into account.[20] In at least one instance, Congress has de-

[19] See, *e. g.*, Section 9 of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755; Section 2 of the Act of June 29, 1936, c. 860, 49 Stat. 2025.

[20] See *e. g.*, Section 308 of the Defense Housing and Community Facilities and Services Act of 1951, c. 378, 65 Stat. 293. Compare Section 511 of the Housing Act of 1956, c. 1029, 70 Stat. 1091, which, following this Court's decision in *Offutt Housing Co. v. Sarpy County*, 351 U. S. 253, amended Sec-

termined that all other payments made by the Federal Government to the taxing authority shall also be considered.[21]

Quite apart from permissive taxation or payments in lieu of taxes, the Federal Government has a vast program of financial assistance to state and local governments, such as direct grants or revenue-sharing arrangements. In the fiscal year 1956, federal aid to states and localities totaled $3,752,565,187. The Bureau of the Budget has estimated, on the basis of existing and proposed legislation, that the total assistance for the fiscal year 1958 will rise to $5,501,991,789. See Budget of the United States Government for the Fiscal Year Ending June 30, 1958, pp. 1127–1133.

Whether the federal program is adequate or inadequate is not, of course, a matter for determination here. The point is simply that Congress, and Congress alone, is empowered to waive the federal immunity and to determine the extent of that waiver. The Military Leasing Act authorized local taxation of the lessee's interest in the property here involved. The Michigan statute is invalid because it ignores that

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tion 408 of the Housing Amendments of 1955, c. 783, 69 Stat. 635, to provide that taxes upon the interest of a lessee of a so-called Wherry Act Housing project are to be diminished, first, by the value of services provided by the Federal Government which are ordinarily provided by taxing authorities; second, by value of such services provided by the lessee; and, third, by federal payments made "with respect to such property."

[21] Section 403 of the Defense Housing and Community Facilities and Services Act of 1951, c. 378, 65 Stat. 293.

limitation and seeks to reach the entire governmental interest in the property.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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SEPTEMBER 1957.

APPENDIX

Michigan Public and Local Acts (1953), p. 252:

PUBLIC ACT No. 189

AN ACT to provide for the taxation of lessees and users of tax-exempt property.

The People of the State of Michigan enact:

211.181 Taxation of lessees and users of tax-exempt property; exception. [M. S. A. 7.7 (5)]

SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182 Assessment and collection; action of assumpsit. [M. S. A. 7.7 (6)]

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not be-

come a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

This act is ordered to take immediate effect.

Approved June 10, 1953.

Act of August 5, 1947, c. 493, 61 Stat. 774 [The Military Leasing Act of 1947]: [22]

[SEC. 1.] [As amended by Sec. 605, Act of September 28, 1951, c. 434, 65 Stat. 336.] * * * That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and

[22] Repealed by Section 53, Act of August 10, 1956, c. 1041, 70A Stat. 641, and re-enacted in revised form by the same Act as 10 U. S. C., Section 2667. Section 6 of the Act of August 5, 1947, now appears as Section 2667 (e) of 10 U. S. C., which reads as follows:

The interest of a lessee of property leased under this section may be taxed by State or local governments. A lease under this section shall provide that, if and to the extent that the leased property is later made taxable by State or local governments under an act of Congress, the lease shall be renegotiated.

conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands.

(34 U. S. C. 1952 ed., Sec. 522a.)

SEC. 3. (a) Notwithstanding any other provision of law, all right, title, and interest of

Reconstruction Finance Corporation in any plants or facilities, and the machinery, equipment, and other personal property accessory thereto, acquired by Defense Plant Corporation or Reconstruction Finance Corporation in accordance with authority contained in the Reconstruction Finance Corporation Act (U. S. C., title 15, secs. 601–617) pursuant to undertakings by the War Department or the Navy Department to reimburse Defense Plant Corporation or Reconstruction Finance Corporation to the extent of the unrecovered cost thereof in the event Congress authorizes such reimbursement by making appropriations therefor, shall be transferred by Reconstruction Finance Corporation (or by War Assets Administration, if such property has been declared surplus) to the War Department or the Navy Department upon certification by the Secretary of War or the Secretary of the Navy made within six months after the enactment hereof, that the retention of such plants or facilities, and the machinery, equipment, and other personal property accessory thereto, by the War Department or the Navy Department, as the case may be, is necessary for the maintenance of an adequate Military or Naval Establishment including industrial reserve.

(b) Notwithstanding any other provision of law, all right, title, and interest of Reconstruction Finance Corporation or War Assets Administration in any machinery or equipment shall be transferred by the agency having control thereof to the War Department or the Navy Department upon certification by the Secretary of War or the Secretary of the Navy made within six months after the enactment hereof, that the retention of such machinery or equipment by the War Department or the Navy Department, is necessary for the maintenance

of an adequate Military or Naval Establishment, including industrial reserve.

(34 U. S. C. 1952 ed., Sec. 522b.)

SEC. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated.

(34 U. S. C. 1952 ed., Sec. 522c.)

Nos. 26, 37, and 38

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 26

UNITED STATES OF AMERICA, AND BORG-WARNER CORPORATION (DETROIT GEAR DIVISION), APPELLANTS

v.

CITY OF DETROIT, A MUNICIPAL CORPORATION

No. 37

UNITED STATES OF AMERICA, APPELLANT

v.

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION, ET AL.

No. 38

CONTINENTAL MOTORS CORPORATION, ETC., APPELLANT

v.

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION, ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE UNITED STATES

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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE UNITED STATES

In their briefs appellees concentrate on the form of Public Act No. 189 of Michigan, and insist that by

calling itself a tax on the *use* of tax-exempt property the tax involved is therefore not a tax on tax-exempt property. Appellees discount the substance, purpose, and effect of the Michigan statute, and all but ignore Congressional action in the field which reaffirms the immunity from local taxation of the Government's interest in leased property.

I

ACT NO. 189 IS IN VIOLATION OF THE CONSTITUTIONAL IMMUNITY OF UNITED STATES PROPERTY FROM LOCAL TAXATION WHICH EXISTS IN THE ABSENCE OF CONGRESSIONAL LEGISLATION

A. ACT NO. 189 IS INVALID SINCE IN PURPOSE, EFFECT AND SUBSTANCE IT IS A TAX ON GOVERNMENT-OWNED REAL PROPERTY

It is not disputed that the purpose of the tax is to collect revenue based on the assessed value of Government-owned real estate. It is equally undisputed that the effect, if the tax is sustained, is that the United States will pay and the local authorities will receive amounts measured by the local real estate taxes on the Government's tax-exempt real estate. In substance the tax involved is identical to the real estate tax which Michigan and the local taxing authorities concededly could not levy.

In form it is no different except that Michigan does not claim rights which it could not claim. Under Michigan law real estate taxes are assessed to the owner "and also to the occupant" (Gov. Br. No. 26, p. 33, fn. 16); and constitute a lien against the property. By dropping an assessment against the owner and by dropping the lien Michigan does not thereby

make United States property subject to what is in purpose, effect and substance an *ad valorem* real estate tax.

Appellees' argument that they are taxing the private party and not the Government was answered by this Court in *United States* v. *Allegheny County*, 322 U. S. 174, 187:

> * * * the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment.
>
> It is contended the whole value of the property may be reached since the impact of the tax is upon Mesta. * * *
>
> We think, however, that the Government's property interests are not taxable either to it or to its bailee. * * *

In quoting the Court's language in the *Allegheny* opinion to the effect that "beneficial personal use of the property may be taxed" to a contractor (Appellees' Br. Nos. 37 and 38, p. 16), appellees stop short and fail to quote the next sentence:

> But neither he nor the Government can be taxed for the Government's property interest. [322 U. S. at 188]

The Court there made it clear that in taxing the "use of the property" a state could not include, in the measure of the tax, the value of the Government's property interest. The tax here is a tax on the value of the Government's property interest. And, as this

Court stated in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 629:

> * * * courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words: * * *

B. ACT NO. 189 IS INVALID SINCE IT IS DISCRIMINATORILY DIRECTED AT TAX-EXEMPT PROPERTY

The statute here involved is not a general one, imposing a broad tax, that happens to impinge upon property that is tax exempt. This tax applies only with respect to tax-exempt property. It is the very fact that property is exempt from tax which causes the tax to be imposed. The statute is a conceded attempt to make up for the fact that Michigan cannot constitutionally tax the property involved. But, as Justice Holmes, speaking for the Court in *Miller* v. *Milwaukee*, 272 U. S. 713, 715, said:

> If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good.

There, and again in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, the Court looked through the language of a statute to find that it was in fact directed at tax-exempt property, and in each case held the statute invalid for that reason.[1] Here there is no need to look

[1] In both cases the tax-exempt income at which the statutes were directed included income exempt under state law as well

through language since the purpose is plainly written on the face of the statute.

Appellees rely on *Esso Standard Oil* v. *Evans*, 345 U. S. 495, as authority supporting a tax directed at the use of tax exempt property:

> In the Esso case the state was taxing Esso because of its possession of government-owned property for storage. * * * Tennessee taxed the privilege of "storing" tax-exempt property in connection with a business conducted for profit. [Appellees' Br. Nos. 37 and 38, p. 17.]

Such a statement of the case is incorrect. Tennessee did not tax Esso *because* the gasoline it stored was tax-exempt. Nor did it tax the "privilege of storing tax-exempt property." We submit that such a tax would have been invalid. Tennessee imposed a general tax "for the privilege of storing gasoline measured by the amount stored during the month" (345 U. S. at 498). The Court pointed out (345 U. S. at 499)

> This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property.

Unlike the Tennessee statute involved in the *Esso* case, the Michigan act is not only "based on the worth of the government property" but is directed solely at those who deal with tax-exempt property. The implied immunity of United States property cannot be

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as that resulting from Federal immunity. But the statutes were found invalid, the Court pointing out in *Miller* v. *Milwaukee*, 272 U. S. 713, 715, that the Federal immunity "certainly is the most conspicuous instance of exemption at the present time." The same is, of course, true under the Michigan statute here involved.

overcome by an offsetting tax directed solely at tax-exempt property.

II

BY LEGISLATION DECLARATORY OF EXISTING LAW CONGRESS HAS FIXED THE VALUE OF THE LESSEE'S INTEREST AS THE LIMIT UP TO WHICH LEASED GOVERNMENT PROPERTY MAY BE TAXED

Our brief on the merits in No. 26 concluded as follows (pp. 27–28):

> The Military Leasing Act authorized local taxation of the lessee's interest in the property here involved. The Michigan statute is invalid because it ignores that limitation and seeks to reach the entire governmental interest in the property.

Appellees in Nos. 37 and 38 do not discuss the Military Leasing Act other than in one sentence (Br. p. 26) to the effect that we concede that Continental's possessory interest is subject to tax. Appellee in No. 26 argues briefly that Section 6 of the Military Leasing Act of 1947 is not applicable since the tax here is imposed on "the privilege of using" the property, not on the "lessee's interest" (Br. pp. 24–25). But the right to use the property and the lessee's interest are one and the same thing. Michigan's Public Act No. 189 not only violates the implied immunity of Federal property from state taxation in the absence of statute, but violates the statutory immunity established by the Military Leasing Act.

Whatever may be the scope of the implied immunity from local taxation conferred on United States property by the Constitution, Congress may by legislation define the line between what may be

taxed and what may not. In order to protect functions validly authorized Congress may, under the necessary and proper clause, expand the scope of Federal immunity beyond what it would be in the absence of statute. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33. In particular, Congress may make government contractors immune from local use and sales taxes. *Carson* v. *Roane-Anderson Company*, 342 U. S. 232. On the other hand, Congress may waive the immunity from local taxation which federal-owned property otherwise enjoys. In the field of local taxation of government-owned defense plants leased to private corporations Congress has acted. As we point out below, *infra*, pp. 19–25, Congress has in recent years given this problem a great deal of attention. Prior to the assessment of the taxes here involved, Congress had adopted the Military Leasing Act of 1947, 61 Stat. 774 (see Gov. Br. No. 26, pp. 30–33), which indicates the extent to which Congress permits the taxing of a lessee of a government-owned defense plant.

A. THE MILITARY LEASING ACT OF 1947 AUTHORIZES LOCAL TAXATION OF A LESSEE'S INTEREST, BUT NOT OF ANY VALUE REPRESENTING THE GOVERNMENT'S OWNERSHIP INTEREST

Section 6 of the Military Leasing Act of 1947 provides:

> The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property

> is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated.

The legislative history of this section, the language itself, and the prior construction of the Act by this Court, all demonstrate a Congressional understanding and intent that local authorities may tax the lessee's interest measured by the value of that interest, but may not tax value of Government-owned property which represents the Government's ownership interest.

In the hearings before the House Committee on Armed Services, Mr. Kenney, Assistant Secretary of the Navy, discussed with the Committee what would be the status of the defense plants if the leasing act were passed (Hearings before the House Committee on Armed Services on H. R. 3471, 80th Cong., 1st Sess., p. 2353):

> Mr. SHAFER. * * * Now, in that connection the question has been raised as to taxes on this property to the lessee, in view of recent court decisions and so on.
>
> What do you recommend that the committee might do to at least assure local governments of taxes on this property that is to be leased?
>
> Mr. KENNEY. Of course, under existing law that portion of the property which the Government has title to would not be subject to local taxes. Would not the leasehold interest of the lessees be subject or could it not be made subject to taxes?
>
> Mr. SHAFER. I think it should be made subject to taxes.
>
> * * * * *

Mr. KENNEY. Unless the local laws make the leasehold interest taxable, there would be no taxes accruing to the local community.

* * * * *

Mr. BLANDFORD. Couldn't we incorporate a clause in the bill that for local tax purposes this property shall be deemed to be owned by the lessees only for that purpose, thus leaving the local governments free to tax these people who have leased this property on a long-term lease; and that could be considered in the money you receive as compensation.

Mr. KENNEY. I seriously question whether that would be the wise way to handle it because you may have an extremely valuable piece of property worth many millions of dollars, yet its value to the lessee is relatively small, and it is advantageous for the Government to have somebody in there using it, if for no other purpose than the fact that he is maintaining it as a going concern and not as a dead, dormant factory, with its smokestacks idle; and yet the person might not be willing to lease it if he felt he was going to have to pay a tax on the full value of that property.

Before the Congress the Government's position was thus that it wanted authority to enter into long-term leases on defense plants under which the lessee would be subject to tax on its leasehold interest, but would not "have to pay a tax on the full value of that property." There can be no doubt that in approving the bill the House Armed Services Committee understood that under the leases which that bill would authorize the lessee could not be required to pay taxes based on the full value of the property leased.

The Committee added what is now the second sentence of Section 6, a section which did not appear in the bill as submitted. This sentence provided that each lease should contain a provision that if and to the extent that such property is made taxable by local authorities "by Act of Congress" then the terms of the lease should be renegotiated. This language demonstrates the Congressional understanding that the imposition of such taxes could only come about by Act of Congress.

The Hearings before the Senate Armed Services Committee on the Military Leasing Act, during which the first sentence of Section 6 was drafted, are equally explicit as to the Congressional understanding. We have reprinted in Appendix A, *infra*, pp. 26-36, discussion in that Committee on this point. (Hearings before the Senate Committee on Armed Services on S. 1198 (H. R. 3471), 80th Cong., 1st Sess., a Bill to Authorize Leases of Real or Personal Property by the War and Navy Departments, pp. 27-32). There it was categorically stated at the outset that if this property was to be taxed by state and local authorities it would have to be by an act of Congress. Senator Baldwin proposed an amendment to the bill in the following language (p. 28):

> Property leased to private persons, corporate or individual, pursuant to the provisions of this act, shall be subject to State and local taxation in accordance with such State and local law.

This suggestion was not adopted. The Senator later proposed (p. 30) that a lease for a term of one or more years should "for the purpose of taxation alone

be deemed to transfer a title in fee simple for the purpose of the lease." This suggestion also was not adopted.

Secretary Royall explained his understanding of the scope of the existing immunity of United States property (p. 31):

> As I say, I understand the possessory interest tax has been applied, and I think it is constitutional. That would apply to this situation if it is constitutional, and I imagine it is.
>
> You could say in this statute, if there is any question about that, that the possessory interests of the lessee should be subject to local tax.
>
> * * * * *
>
> Mr. KENNEY. Your State could make the leasehold interest itself taxable, which I think should be all that could be taxable.
>
> Senator BYRNES. That is right. Say the lease was for 5 years. You could take up the value of the lease, which would be an infinitesimal part of the value of the property.

There was further discussion to the effect that a leasehold interest could be taxed "without us doing anything about it." "So why should we put anything in?" (p. 31). Secretary Royall saw no objection to putting it in if there was any question about it. The language was then drafted which is now the first sentence of Section 6 of the Leasing Act providing that the "lessee's interest * * * shall be made subject to State or local taxation."

The legislative history of this provision thus makes two points abundantly clear: (1) that Congress authorized the leasing of defense plants on the understanding

that, under the constitutional immunity, the leasehold interest in Government property was the only value subject to local taxation; and (2) that for leases made under the Military Leasing Act of 1947 it was explicit that the value of the lessee's interest, and only that value, was to become subject to such taxation.

This Court recently considered Section 6 of the Military Leasing Act of 1947 in *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253. There, local authorities were taxing a lessee for buildings and improvements held at nominal rent under a long-term lease. All members of the Court agreed that the local taxing authority had no power to tax more than the lessee's interest. A majority of the Court found that the value by which the tax was being measured did not, under the circumstances, exceed the lessee's interest:

> Petitioner also argues that the state tax, measured by the full value of the buildings and improvements, is not on the "lessee's interest," but is on the full value of property owned by the Government. * * * The lease is for 75 years; the buildings and improvements have an estimated useful life of 35 years. The enjoyment of the entire worth of the buildings and improvements will therefore be petitioner's.
>
> * * * * *
>
> In the circumstances of this case, then, the full value of the buildings and improvements is attributable to the lessee's interest.[1]

[The Court's footnote is as follows:]

> [1] The record before us is unclear whether the estimated useful life of all the appliances and furniture is less than the lease period. To the extent that the estimated

> useful life of any of these items extends beyond the term of the lease, *the value* attributable to such period *must be excluded from the tax, since it represents the Government's ownership interest.* * * *
>
> [351 U. S. at 261, 262; emphasis added.]

The majority opinion thus clearly indicates that a tax on the lessee's interest cannot be measured by more than the value of that interest.

Four members of the Court dissented, believing that under the circumstances the lessee's interest was less than the full fee value, and that the tax could not be measured by that value. All members of the Court thus agreed that under the Military Leasing Act of 1947 no more than the lessee's interest could be taxed. There is no suggestion in the opinions that in the absence of the Military Leasing Act a tax could be measured by a greater interest.

The Borg-Warner lease, involved in No. 26, was made pursuant to the Military Leasing Act of 1947 (R. 62). Under Section 6 of that Act it is the "lessee's interest" which "shall be made subject to State or local taxation." The second sentence of Section 6 indicates that the "property" leased shall not be taxable except by further act of Congress. Although the Act itself contains no express prohibition against a state's imposing a tax on the Government's interest in leased property, we submit that the legislative history reviewed above removes any doubt as to the meaning of the Military Leasing Act, and that for leases made under that Act the only value which is

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[2] It should be noted that Sarpy County did not attempt, as do appellees here, to tax the value of the land itself.

subject to local tax is the value of the lessee's interest.

The arrangements under which Continental Motors occupied the United States property in Muskegon, involved in Nos. 37 and 38, were not stated to be under the Military Leasing Act of 1947, but rather under the First War Powers Act of 1941, c. 593, 55 Stat. 838 (R. 123) and the Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21 (R. 82, 86, 115). These contain no authorization to tax even the lessee's interest. But we believe that the Military Leasing Act of 1947 is declaratory of the law in this regard and that the same substantive standard applies to both cases. The Congressional discussion referred to above indicates a general understanding that the value of a leasehold interest could be taxed by a local authority without express statutory consent, and we accept that view. Certainly, however, that discussion would provide no support for the theory that the interest of a lessee terminable at will could be taxed to a greater extent than that of a long-term lessee under the Military Leasing Act of 1947. It is inconceivable that Continental's "interest" in the Muskegon property is more subject to local taxation under the rule of implied immunity than is Borg-Warner's interest expressly made subject to local taxation in the Military Leasing Act of 1947.[8]

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[8] As pointed out in our brief in Nos. 37 and 38, Continental was simply working on United States property to make items for the United States. It was engaged exclusively in the Government's business on the Government's property. If it could be taxed for the "privilege of using" United States property, presumably Virginia could tax the Secretary of Defense for the "privilege of using" the Pentagon—measured by the value of that building.

B. A TAX ON THE LESSEE'S RIGHT TO USE GOVERNMENT PROPERTY IS A TAX ON THE LESSEE'S INTEREST, AND MAY BE MEASURED BY NO MORE THAN THE VALUE OF THAT INTEREST

Although the legal incidence of a tax may be important, the particular words used by a state are not controlling. The tax here imposed is on "lessees and users of tax-exempt property." (R. No. 26, p. 49.) The Supreme Court of Michigan has stated (R. No. 26, p. 56) that—

> * * * the tax imposed is not *ad valorem* on the property nor on the leasehold, but a specific tax on the privilege of using the property * * *.

We submit that the privilege or right of using the Government's property is what the lessee has by virtue of the lease, and that a tax on such a right is a tax on the lessee's interest.

We first note that the "privilege" of using tax-exempt property belonging to the United States is not something within the control of the state of Michigan. Cf. *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187. This is not like a tax on the privilege of being a druggist, or a butcher, or a storer of gasoline, which may properly be considered as a "privilege" of doing business, subject to state control and taxation. There is no separate occupation of being a user of tax-exempt property. The United States determines who shall lease its property. The only right or privilege which that person has with respect to the property is conferred by the lease.

Appellees say that they are imposing a tax on the lessee's privilege of using the Government's property, not on the lessee's interest in the property (Ap-

pellee's Br. No. 26, p. 25). But the two are precisely the same. Appellees do not attempt, nor are they able, to distinguish between them. The "lessee's interest", and the only interest the lessee has in the property, is the privilege of using it for a period of time under stated conditions. By imposing a tax on the lessee's privilege of using the property Michigan is imposing a tax on the lessee's interest in the property.

Appellees in Nos. 37 and 38 aptly quote Mr. Justice Cardozo in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582 (Br. p. 5):

> The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership.

But the privilege of use is the very ownership interest which the United States has, by lease, conveyed to Borg-Warner and Continental. The privilege of use is the very interest which these lessees have as lessees. In imposing a tax on that privilege appellees are imposing a tax on the lessees' interest in Government property, and the tax cannot be based on more than the value of their property interest. Similarly, it is our view that a "use" tax could not be validly imposed on Government-owned equipment used by a contractor. Certainly, it could not be so imposed unless the contractor had an independent property interest in the equipment and the tax were measured by the value of that limited interest.

If the privilege of use should not be considered identical to the lessee's entire interest in the property, it is certainly a portion of the lessee's interest and con-

tained within it. The lessee might be thought to have other rights and privileges, but at least one of them is the right or privilege of using the Government's property in connection with a business conducted for profit. What Michigan is purporting to tax is either the lessee's entire interest or a portion of it. And we submit that in either case the limit on the measure of the tax is the same. By taxing a portion of the lessee's interest Michigan cannot tax a greater value than it could by taxing all of it.

The Military Leasing Act of 1947, in this respect declaratory of existing law, has fixed the value of the lessee's interest as the maximum limit up to which leased Government property is subject to local taxation. The interest of a lessee in real property is a well recognized concept in the law. This Court has considered the elements which should be taken into account in determining its value. See *United States* v. *Petty Motor Co.*, 327 U. S. 372, 381. The value of a lessee's right to use property is involved in every condemnation case where there was a non-terminating lease in effect. Michigan may no more claim that that right is properly measured by the full fee value of the property than could a lessee whose interest had been condemned.

III

DETERMINING THE STANDARDS AND METHODS OF FINANCIAL CONTRIBUTION TO LOCAL JURISDICTIONS ON ACCOUNT OF GOVERNMENT-OWNED REAL PROPERTY IS A MATTER FOR CONGRESS

Appellees argue that it is for this Court to draw the line between those interests in United States prop-

erty that may be taxed (and to what extent) and those interests which may not:

> The issue is a judicial one rather than one for the legislature. Just as the whole doctrine of governmental immunity had its origin in a decision of the court, it is for the court to determine the proper scope and application of the doctrine in the light of the realities of present-day affairs. [Appellees' Br. Nos. 37, 38, p. 30]

But the fact that the Court decided *McCulloch* v. *Maryland*, 4 Wheat. 316, does not require it to consider each local taxing statute as though Congress had not legislated in the field.

In *United States* v. *Allegheny County*, 322 U. S. 174, 190–191, the Court stated:

> The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity and what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and burdens is for other departments, and studies to that end have been undertaken. We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress.

In the thirteen years that have passed since that opinion was written it has become even more clear that neither local authorities nor the courts can determine the extent to which financial contribution should be exacted with respect to Federally-owned real property. Congress is the only body with both the authority and the means at its disposal to deal with the problem. And Congress has been active in the field.

A. CONGRESS HAS GIVEN DETAILED ATTENTION TO THE PROBLEM OF TAXES AND PAYMENT IN LIEU OF TAXES FOR GOVERNMENT-OWNED PROPERTY

We have gathered in appendices to this brief some indication of the amount of attention which Congress has devoted to the problem of providing local jurisdictions with funds to compensate them with respect to tax-exempt Federal property. Listed in Appendix B *infra*, p. 37, are most if not all of the bills which have been introduced on this subject since the 80th Congress. It will be seen that there are some 25 bills which have been introduced in the Senate during this time and almost 100 bills which have been introduced in the House. A large number of these are proposals to authorize local authorities to tax the full value of real property owned by the United States. Some deal specifically with the problem of government-owned plants leased to private persons. E. g., H. R. 4887, 84th Cong.; H. R. 8454, 82d Cong. Proposed legislation, which would make such government-owned plants subject to taxation by the local authorities, has not been adopted.

Congress has devoted substantial time to the study of the complicated problems involved. Listed in Appendix C, *infra*, p. 49, are some of the hearings which have been held. Also listed there are reports and studies which have been made for the Congress. A glance through these lists will indicate the detailed attention which this problem has received and is receiving from Congress.

B. THE PROBLEM OF COMPENSATING LOCAL AUTHORITIES WITH RESPECT TO UNITED STATES PROPERTY WHICH IS NOT TAXABLE IS HIGHLY INTRICATE, AND BEST HANDLED BY LEGISLATION

A perusal of the materials referred to in Appendices C and D will indicate the complexity of the problem involved in these cases. If a state can, without the consent of Congress, tax the value of industrial plants on the theory that it is taxing the privilege of using them, what is the consequence as to other property of the United States? Can states tax the value of Federal grazing lands to those who have the privilege of grazing cattle and sheep on them? Can they tax the value of national forests or Government irrigation projects to those who have the privilege of using them? The myriad of problems involved as a consequence of the Federal immunity of different categories of Government-owned property are well summarized in the Report on Taxes and Other In-Lieu Payments on Federal Property, prepared by the Legislative Reference Service, Library of Congress, for the use of the House Committee on Interior and Insular Affairs, 83rd Cong., 2d Sess., Committee Print No. 23, pp. 27–90.

A range of other problems relate to the basis for calculating payment, if any, and for distinguishing among those cases where payment should be based on benefits received or services rendered, those where it is more fairly based on assessed value, and those where it is best calculated as a portion of the income derived by the Government from the property. Where a community has grown up around a Federal installation the problem is quite different from the case where property currently being taxed is taken off the tax rolls.

Any examination demonstrates that the problem is one calling for a flexibility of treatment which is possible only by legislative sanction.

C. WHERE CONGRESS HAS CONSIDERED IT DESIRABLE, IT HAS WAIVED ITS IMMUNITY, PROVIDED PAYMENTS IN LIEU OF TAXES, OR AUTHORIZED OTHER MEANS OF DEALING WITH THE PROBLEM

For over a century Congress has acted to provide the states with taxes or payments in lieu of taxes for United States property in circumstances where it considered such payments necessary or proper. See Act of May 14, 1834, 4 Stat. 673, 675; Act of March 3, 1851, 9 Stat. 598, 615; Act of Aug. 31, 1852, 10 Stat. 76, 83.[4] In recent years Congress has enacted a large body of legislation in the field. Listed in Appendix D, *infra*, pp. 51–58, is legislation dealing with this problem.[5]

[4] See the debate on the appropriation to pay Pennsylvania a property tax on the United States mint, Cong. Globe, 31st Cong., 1st Sess., 1644 (1850). The appropriation was passed, 9 Stat. 523, 541, but apparently the judgment it was designed to meet was later annulled by the Pennsylvania legislature. Cong. Globe, 31st Cong., 2d Sess., 394, 399 (1851).

[5] The list of legislation is based on a study made in 1954, which was said to be current as of that time.

In some cases Congress has permitted non-discriminatory state and local taxation. This policy apparently dates back to 13 Stat. 112 (1864) when Congress permitted the taxation of the real estate of national banks, which would have been immune but for the consent. Property held by the Commodity Credit Corporation, Federal Deposit Insurance Corporation, and a number of other agencies is subject to local taxation. So is property acquired under the alien property laws or by the Veterans Administration through foreclosure. Other situations are handled by payments in lieu of taxes. Property acquired by the Atomic Energy Commission is illustrative of this category.

Another method of making payments to local authorities with respect to tax-exempt real property is to grant the state a portion of income from the property. For example, 25% of money received from a national forest is paid to the state in which the forest is located. Forest lands are in a way comparable to the leased property involved in the instant cases. It is tax-exempt property which private persons are allowed to use for profit. Rather than granting to the states the right to tax the privilege of using the forest lands, Congress has granted to the states a portion of the revenue which the lands earn.

Still another method is demonstrated by Public Laws 874 and 815, 81st Congress, as amended. These Acts authorize Federal financial assistance to local educational agencies affected by activities of the Federal Government. The amount of assistance takes into account the number of children in average daily attendance at state schools who either live on Federal prop-

erty or live with a parent who works on Federal property.

This entire legislative structure is based on the premise that the states do not have the power to tax the value of Federally-owned property. To hold that in the absence of Congressional action Michigan has the power to tax the privilege of using United States property, and may measure the tax by the full value of that property, would undercut much if not most of the legislation in the field. The problem with which all these laws deal is not one of form, but of substance. Congress has been dealing with the substantive problem of determining the proper methods of making financial contribution to local jurisdiction with respect to United States-owned property. Michigan may not, by changing the name of its tax, gain a right which Congress has been unwilling to grant.

D. CONGRESS HAS CONSIDERED SOME OF THE PROPERTY INVOLVED IN THESE CASES AND HAS AUTHORIZED PAYMENTS WITH RESPECT TO IT

In considering appellees' argument that it is not for Congress but rather for this Court "to determine the proper scope and application of the [governmental immunity] doctrine in the light of the realities of present-day affairs" (Br. Nos. 37 and 38, p. 30), the Court should consider the fact that Congress has, by legislation, authorized payments to appellees with respect to property involved in this litigation.

Under Public Law 874 of the 81st Congress enacted in 1950 (64 Stat. 1100; extended to June 30, 1958 by 70 Stat. 968), payments are authorized to federally affected school districts for current operating ex-

penses. The Orchard View School District, one of the appellees here in Nos. 37 and 38, has received payments under this legislation—payments made because of the property which is owned by the United States and occupied by Continental. The 5th Annual Report of the Commissioner of Education on the Administration of Public Laws 874 and 815, page 35, indicates that the Orchard View School District received $15,605* during fiscal year 1955. The 6th Annual Report, page 41, shows that during fiscal year 1956 it received $15,596. Congress having adopted a legislative formula to determine the amount by which the United States should support the Orchard View School District because of the Government-owned and hence tax-exempt property in Muskegon, it is not for that school district, or for Michigan, to adopt a different one.

Again, in 1954, Congress legislated with respect to the tax status of the Government-owned property in Muskegon involved in the Continental case. Public Law 388, 84th Congress, 69 Stat. 721, authorized payments in lieu of taxes on property transferred from the Reconstruction Finance Corporation. This law was designed as a temporary measure to expire December 31, 1958, the hope being that by that time Congress would be able to enact more comprehensive legislation dealing with the problem.

House Report 1453, on H. R. 6182, 84th Cong., 1st Sess., which became Public Law 388, shows that Con-

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*We are informed that this is a preliminary figure (which should have been marked with a single, not a double, asterisk) and that the final figure received by the school district was actually $21,777.04.

gress had before it the very problem of the plant operated by Continental at Muskegon. That report lists the properties which would be subject to payments in lieu of taxes. Prominent on that list (the second largest plant involved, judging by the annual tax payments on the property at the time of transfer) is the Government-owned plant at Muskegon operated by Continental.

Congress has had before it the vast and complicated problem of resolving the equities between local communities and tax-exempt property owned by the United States. It has repeatedly legislated in this field, providing payments in lieu of taxes or authorizing local authorities to tax the value of the Government's interest. The premise upon which all such legislation is based is that, absent legislation, local authorities may not measure a tax by the value of the Government's property. A decision upholding Public Act No. 189 of Michigan would not provide an appropriate framework for settling the substantive problems. It would rather provide one additional, and unexpected, complication to a legislative problem with which Congress has been dealing and must continue to deal.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROGER FISHER,
Assistant to the Solicitor General.

WALTER B. ASH,
Attorney.

NOVEMBER 1957.

APPENDIX A

SENATE COMMITTEE DISCUSSION ON SECTION 6 OF THE MILITARY LEASING ACT OF 1947

EXCERPT FROM HEARING BEFORE THE SENATE COMMITTEE ON ARMED SERVICES ON S. 1198 (H. R. 3471), 80TH CONG., 1ST SESS., A BILL TO AUTHORIZE LEASES OF REAL OR PERSONAL PROPERTY BY THE WAR AND NAVY DEPARTMENTS, PAGES 27–32 (JULY 19, 1947)

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Senator BYRD. I would like to ask about section 6 in regard to taxation. Does that mean that if this property is taxed by the State and local governments, it would have to be by an act of Congress?

Mr. KENNEY. It would, sir.

Senator BYRD. Of course, there is a question involved there of taking these plants and leasing them to private companies and the private companies making a profit. It is a question of whether or not they should not pay taxes to the local and State governments.

Mr. KENNEY. My own feeling is, Senator, that taxes should be paid on property that is used for that purpose. The Federal Government in making its terms of lease should agree with the local authorities that they will pay the amount of taxes that would otherwise have accrued.

Senator BYRD. Can you do that legally if the title is vested in the Government itself?

Mr. KENNEY. You can do it only if Congress so authorizes.

Senator BYRD. This is no authorization.

Mr. KENNEY. Section 6 is no authorization; that is true.

Senator BYRD. You would have to get a special act through or some general act. As long as you are going into this, you might give consideration to it; because if it is used for private leasing and profit, it does look like they should pay taxes.

The CHAIRMAN. Otherwise, their competitors would be at a disadvantage.

Mr. KENNEY. No. We would certainly take that fact into consideration in the amount of rental we would require be paid.

Senator HILL. And the local community or certainly the county needs that tax money no doubt.

Senator BYRD. Some of these cost 30,000,000. That is a big proposition.

Mr. KENNEY. Mr. Cox says there are 17 bills which have been introduced in the House to deal with that subject. It is a dreadfully complicated subject, and this bill does not change anything with respect to that particular situation.

Senator BYRD. But you are going into a new thing. These war plants operated for the war. Now, you are going into the peace and you are leasing them to private industry. Private industry is going to make a profit, naturally. They are going to be in competition. You have got three or four big aviation plants here, Curtiss-Wright, Whitney, and so forth, and they are worth, roughly, I should say, about $100,000,000. They will be nontaxable in competition with other airplane production plants that will be taxed.

Mr. KENNEY. Well, what we do under this bill in no way increases or decreases the amount of taxes to which these properties may be subject.

Senator BYRD. But you are undertaking something we have not done before. Instead of selling it as surplus property, you are retaining them for future emergency. I think that is wise. Then you are operating them and leasing them to private companies. That is a new situation; is it not?

Mr. KENNEY. That is correct, Senator.

Senator BYRD. It looks to me like there should be some provision somewhere in there. They have taken over Arlington, Va. There are no plants there, but they have taken nearly the whole of Arlington County away from taxation. I know what it means.

Mr. KENNEY. It is a very serious thing, and it is a subject on which I feel quite strongly, because I think the Government owns more land in my State of California than probably any other State in the Union, and in certain counties it has created a very bad situation.

The CHAIRMAN. Why can you not say the commercial firm leasing these buildings and plants shall be subject? Why can you not say that in this bill?

Mr. KENNEY. The local authorities, the States, would have authority to make a leasehold interest taxable. I believe in certain States leasehold interests are subject to taxation.

Senator HILL. Is that not true in a small number of States?

Senator TYDINGS. What effect would that have on the price of the lease the Government would attempt to negotiate?

Mr. KENNEY. The amount that the Government would receive under those circumstances would be less, I presume.

Senator TYDINGS. It also would make it more difficult to keep the plant or put the plant in use, would it not?

Mr. KENNEY. It would, sir.

Senator TYDINGS. So the net result is that while the local community would get a little money if they leased the plant, there is a good probability that they might not be able to lease the plant because there are very large and tremendous buildings. The net result would be that in that case the local community would not get any revenue and the Government would not get any revenue either; and the plant would fall into disrepair from lack of use.

Mr. KENNEY. That is correct.

Senator TYDINGS. Our choice would be to get a little money for the local governments, as a possible inducement on the one hand at the expense of maybe not leasing the plant and not having it in operation, and keeping money out of the Federal Treasury on the other hand.

Senator BYRD. I think that single item would enter into the success or failure of plants worth 30 or 40 million dollars, but as I see it, you are allowing private ownership to compete with other private ownership, and one is exempt from taxes and the other is not.

Senator BALDWIN. What would you think about this language? [Reading:]

> Property leased to private persons, corporate or individual, pursuant to the provisions of this act, shall be subject to State and local taxation in accordance with such State and local law.

Would that provision answer the question? Of course, you would have the problem of whether or not if the fee still remained in the Government, as it would under this bill, you would have a taxable interest there that the local people could tax at all; but they could certainly tax personal property in the

plant, the machinery and things that might be used in connection with it.

Senator TYDINGS. Not unless title was in the lessee.

Senator BALDWIN. Yes.

Senator BYRD. It may be that there are quite a number of instances in addition to this that will come under the general policy of retaining these plants for future emergency and in the meantime leasing them to private companies.

Mr. ROYALL. Mr. Chairman, on this question, we discussed it pretty fully in the House, and the views of the War Department are these: That any property used for commercial purposes in any State, even though the title is in the Government, is certainly property that should be taxed by the local government.

As a matter of fact, we stated, I think, to the committee, both the Army and Navy, we had no objection to a provision of that kind. The reason the committee did not insert it, as I gather, was because of the complications of it. They thought it ought to be provided by other general legislation.

The principal complication is this: In some of these plants we can lease only a small portion of it, and it is almost impossible to segregate it. It may not be all together. The Government will have to maintain part and the lessee part.

Also we have in some of these agreements as a part of the rental the fact that they maintain the Government's part and in some cases we probably will not get any rental. The part they would use is small as compared with the total, and their rental would be the maintenance of the rest.

Those are the reasons. We have no objection, and I assume the Navy does not either, to an insertion that the part that they use can be taxable. How-

ever, that would still present some complications in administration.

The CHAIRMAN. As I get it, then, it was the intention of the War and Navy Departments to get this authority. Then as you make the leases and you do have a tax problem come up where the local interests feel it should be taxed, then the Navy or the Army will come in with a recommendation as to the necessary law that Congress should pass to make that property taxable and treat each one separately, is that right?

Mr. ROYALL. We did not specifically have that in mind. That certainly could be done.

In our State there are large areas of land, and I am sure this is true in your State, where there is a pretty great hardship on local counties. That problem is under study.

Senator BYRD. If you do not get it in this bill, you are not going to get it. In some of these States, 80 or 90 percent of these profits are nontaxable. In Utah, 80 percent is nontaxable. They came from an original grant, as I understand it to the State. It certainly would not be quite fair for the Federal Government to pay 80 percent of the taxes of Utah to the localities. This is an entirely separate and distinct condition, as I see it.

Mr. KENNEY. We assured the House committee when the same question came up there that we would certainly take into account the fact that taxes were not paid on this property in negotiating our lease so that we would not be giving one person an advantage over a competitor.

Mr. ROYALL. That does not help the local community.

Senator BYRD. I know the difficulties of it.

Mr. KENNEY. It was my understanding that they did not want to put it in this bill because of the complicated nature of the problem, but they did put section 6 in, so that if any action was taken, we would then be in a position to proceed. They have many of these tax bills in the House. As a matter of fact, the Armed Services Committee is considering that subject itself.

Senator BYRD. We got the estimate the other day of these different bills. If they were passed, it would amount to about $2,000,000,000 to the Federal Government to pay taxes on all Federal Government property which is now nontaxable. That includes this vast amount of renting and everything else.

Mr. KENNEY. Of course, you can think of another aspect of the problem, Senator Byrd. You might also say that the State governments today in most instances are in better shape financially than the Federal Government is.

Senator BYRD. That is true, but it does not work equally. You take Senator Tydings and those in the adjacent counties of Maryland. Arlington County is now owned 70 or 80 percent by the Federal Government. Yet we are operating as a county. We have to maintain the sewage, roads, and everything else. We get no compensation for that whatever.

Senator BALDWIN. When these properties are leased, should not the lease for the term of the lease be termed a transfer, for the purposes of taxation, of a fee so that it would be taxable under the laws of a particular State, in such language as this:

> A lease of real property or personal property for a term of one or more years shall for the purposes of taxation alone be deemed to transfer a title in fee simple for the purpose of the lease.

I do not know what the property laws with respect to States are.

Senator TYDINGS. To get down to constitutional law, you would be taxing a man on property he did not own, and I am afraid it would not hold water. The mere fact we pass a law saying you shall consider he owns it does not make him own it, and you cannot tax a man for property he does not own.

I think your motive is a good one, but I do not think we can get to it in that fashion.

Senator BALDWIN. A lot would depend on what it said in the lease; would it not?

Senator TYDINGS. No. First of all, you would have to set up on the assessment books what the company actually owned. What he would own would be a lease. He would not own the property. Your law would not say that notwithstanding that he does not own any more than the lease, he shall be taxed on the property. He would go to the assessor and prove he only had a leasehold in it for 1 or 10 years. He could not be assessed more than his lease is worth. He could not be assessed for the physical value of the property because he does not own it. He could be assessed for what his lease is worth. That would be all.

Senator BYRD. Senator Tydings, of course, we could authorize the locality and the State to tax Federal property. The Federal Government could pay it.

Senator TYDINGS. That would help my county very much where they have taken an entire water front and I do not know how many square miles in the Aberdeen Proving Ground and Edgewood Arsenal.

Senator BYRD. I am speaking of these plants. I imagine that could be constitutional could it not, and they could add it to the lease?

Mr. ROYALL. I think the State of California and one or two other States now tax the possessor of the

interest in docks, and so forth, leased from the Government. I assume that is constitutional.

Senator TYDINGS. Secretary Royall, if we wanted to set up a plan of having the plants assessed by the local government, there is only one way in the world to do it, and that would be to transfer them to the local concern that wanted to lease them, to transfer the title to the local concern with a recapture clause and with certain conditions in if that they had to keep it in repair. In that event the entire title of the property would go to the local concern, and we could recapture it.

The only difference between that and the system we have been discussing is that we lease it and compel them to keep it up and keep the title in themselves. So if we had a reversion clause that at the end of the lease, or in the emergency of war, it shall revert in title fee simple to the Government, then each and every one of those properties could be properly taxed and would be taxed by the local authorities.

I do not see any other legal way to handle that will hold water except in that fashion. What do you think of that?

Mr. ROYALL. As I say, I understand the possessory interest tax has been applied, and I think it is constitutional. That would apply to this situation if it is constitutional, and I imagine it is.

You could say in this statute, if there is any question about that, that the possessory interests of the lessee should be subject to local tax.

Mr. KENNEY. A local taxing authority can make the leasehold subject to tax if they want to. That is a matter for the local legislatures to take care of.

Senator TYDINGS. You cannot make a man pay taxes on what he does not own.

Mr. KENNEY. Your State could make the leasehold interest itself taxable, which I think should be all that could be taxable.

Senator TYDINGS. That is right. Say the lease was for 5 years. You could take up the value of the lease, which would be an infinitesimal part of the value of the property.

Mr. ROYALL. Could not that be taken care of by a graduated tax, different types of property have a different type of tax?

Senator TYDINGS. Why not let them have it with a right of recapture?

Mr. ROYALL. The difficulty about it is this: Take, for example, the fact that we have got 47 stand-by plants, at least we hope to have. It costs the War Department an estimated $25,000,000 a year to maintain them. We are trying to lease parts of those plants, in some instances the entire plant, and we hope to get that additional cost down to $10,000,000 or $15,000,000. We have already leased enough to reduce it two or three million and we are proceeding to try to lease the others.

Senator TYDINGS. As a matter of fact, if the Government leases to corporation XB a plant for a period of 5 years without us doing anything about it, they would be taxable by each community in America that taxes leasehold property. So why should we put anything in?

Mr. KENNEY. I do not think you should put anything in this bill.

Senator TYDINGS. That is what I am getting at.

Mr. ROYALL. I do not see any objection to putting it in there if there is any question about it. You had some language here that the possessor of the leasehold interest pursuant to this act may be subject to local or State taxation. That would help.

Senator TYDINGS. Upon the lessee?

Mr. ROYALL. That is right.

Senator TYDINGS. But there ought to be something added to that.

Senator HILL. Something ought to go on there. As it is now, all you do is to say that in the event the State does come along and tax one of these lessees, you renegotiate the contract with them.

The CHAIRMAN. And probably get a lesser rent to cover the tax.

Mr. ROYALL. We would have to do that. They have got to know the basis on which they lease it.

Mr. KENNEY. In the absence of this purchaser being subject to taxes, we would insist on a larger rental.

The CHAIRMAN. Have you got the wording in shape now so you can read it off in full?

Mr. ROYALL. This does not read very smoothly. I think we can straighten it out.

Senator TYDINGS. How would it be to say that the lessee's interest in property may be subject to tax by local authority?

Mr. KENNEY. Any interest of the lessee created pursuant to the provisions of this act may be subject to local taxation.

The CHAIRMAN. Read it off in full, Mr. Secretary.

Mr. ROYALL (reading):

> The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation.

The CHAIRMAN. Is that satisfactory? All right. Are there any further questions on this bill?

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APPENDIX B

Bills Relating to Taxation of Federal Property

Following is a list of legislation which has been introduced in recent sessions of Congress relating to the taxation of United States property or to providing other payments with respect to it.

80th Congress

S. J. Res. 90	To establish a Commission to study intergovernmental fiscal relationships.
H. R. 14	Providing for taxation by the states and for political subdivisions of certain real property acquired for military purposes.
H. R. 581 H. R. 2030 H. R. 2726	Authorizing annual payments to States, territories and insular governments, for the benefit of their local political subdivisions, based on the fair value of the national forest lands situated therein.
H. R. 593 H. R. 1563 H. R. 6288	To provide for local taxation of real estate owned by the United States and for other purposes.
H. R. 741	Providing that certain real property, together with improvements thereon, acquired for military purposes, or for house projects, national parks, or monuments, shall not be exempt from taxation by the States or their political subdivisions.
H. R. 1062	To provide for the reimbursement of the town of Lancaster, Massachusetts, for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.
H. R. 1681 H. R. 1761 H. R. 1949	To provide for payments to the States with respect to certain lands of the United States.

H. R. 2117 — To provide for the reimbursement of the town of Watertown, Massachusetts, for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.

H. R. 2725 — Create a Commission on Federal Contributions to States and local governments by reason of Federal ownership of real property.

H. R. 3035 — Providing for payments to the State of Wyoming and for rights-of-way over and across Federal lands within the exterior boundary of the Jackson Hole National Monument, Wyoming.

H. R. 3271 — To provide for reimbursing Summers County, West Virginia, for the loss of tax revenue by reason of the acquisition of land by the United States for the Blue Stone Reservoir project.

H. R. 3537, H. R. 5984, H. R. 6767 — To authorize the participation of States in certain revenues from national parks, national monuments, and other areas under the administrative jurisdiction of the National Park Service.

H. R. 4022 — Providing for taxation by the States and their political subdivisions of certain real properties owned by the United States of America or its agencies.

H. R. 4537 — To provide for certain payments to States and their political subdivisions as compensation for loss of revenues occasioned by the acquisition of real property by the United States for military purposes.

H. R. 5029 — To provide for certain payments to States, territories and possessions and their political subdivisions as compensation for loss of revenues occasioned by the acquisition of real property by the United States for military purposes.

H. R. 5853 — To provide for State and local taxation of real estate in Arlington County, Virginia, owned by the United States.

81st Congress

S. 767 — To establish a national Commission on intergovernmental relations.

S. 810 — To establish a national Commission on intergovernmental relations.

S. 1946 — To establish a permanent national Commission on intergovernmental relations.

S. 3147 — To establish a temporary national Commission on intergovernmental relations.

S. J. Res. 41 — To establish a Commission to study intergovernmental fiscal relations.

H. R. 27 — Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes.

H. R. 110 — To provide for the reimbursement of the town of Lancaster, Massachusetts for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.

H. R. 132 — To provide for certain payments to States and their political subdivisions as compensation for loss of revenues occasioned by the acquisition of real property by the United States for military purposes.

H. R. 445 — Providing for taxation by the States and their political subdivisions of certain real properties owned by the United States of America or its agencies.

H. R. 568 — To provide for payments to the States with respect to certain lands of the United States.

H. R. 865
H. R. 1355
H. R. 1356 — Creating a Commission on Federal Reimbursement to States and local governments by reason of Federal ownership of improved and unimproved real property.

H. R. 1389 — Authorize the participation of States, territories, and insular possessions in revenues from national parks, national monuments, and other areas subject to the primary administrative jurisdiction of the National Park Service, to provide for the acquisition of land within certain areas administered by the National Park Service and for other purposes.

H. R. 2065 — Providing that certain real property, together with improvements thereon, acquired for military purposes, or for house projects, national

parks, or monuments, shall not be exempt from taxation by States and their political subdivisions.

H. R. 2484.... Authorized grants to Ferry and Okanogan Counties, Washington, in lieu of taxes on certain lands restored to tribal ownership.

H. R. 3357.... Authorizing annual payments to States, territories and insular governments for the benefit of their local political subdivisions, based on the fair value of the national forest lands situated therein, and for other purposes.

H. R. 3359.... To provide for local taxation of real estate owned by the United States, and for other purposes.

H. R. 4194.... To provide for local taxation of real estate and improvements thereon owned by the United States and for other purposes.

H. R. 4214.... A bill authorizing annual payments to States, territories and insular governments, for the benefit of their local political subdivisions, based on the fair value of the national forest lands situated therein.

H. R. 4770.... Create a Commission on Federal Reimbursement to States and local governments by reason of federal ownership of improved and unimproved real property.

H. R. 5026.... To provide for the reimbursement of the States and their political subdivisions for the loss of tax revenue with respect to certain real property, and improvements thereon, acquired by the United States and used by the Armed Forces for recreational and welfare purposes.

82nd Congress

S. 437..... To establish a national Commission on intergovernmental relations.

S. 487..... To establish a temporary national Commission on intergovernmental relations.

S. 836..... To establish a temporary national Commission on intergovernmental relations.

S. 1146..... To establish a temporary national Commission on intergovernmental relations.

S. 2268 ..... Establishing a general policy and procedures with respect to payments to State and local governments on account of Federal real property and tangible personal property, and for other purposes.

H. R. 152 ..... To provide for the reimbursement of the States and their political subdivisions for the loss of tax revenue with respect to certain real property, and improvements thereon, acquired by the United States and used by the Armed Forces for recreational and welfare purposes.

H. R. 175 ..... To provide for local taxation of real estate and improvements thereon owned by the United States, and for other purposes.

H. R. 489 ..... Providing for taxation by the States and their political subdivisions of certain real properties owned by the United States of America or its agencies.

H. R. 2102 ..... Providing for taxation by the States and their political subdivisions of certain real properties owned by the United States of America or its agencies.

H. R. 942 ..... To provide for the reimbursement of the town of Lancaster, Massachusetts, for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.

H. R. 1359 ..... Authorizing annual payments to States, Territories, and insular governments for the benefit of their local political subdivisions, based on the fair value of the national forest lands situated therein, and for other purposes.

H. R. 1864 ..... Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes.

H. R. 2417 ..... Creating a Commission on Federal reimbursement to States and local governments by reason of Federal ownership of improved or unimproved real property.

H. R. 2483 ..... Creating a Commission on Federal reimbursement to States and local governments by reason of Federal ownership of improved or unimproved real property.

H. R. 4321 ..... Creating a Commission on Federal reimbursement to States and local governments by reason of Federal ownership of improved or unimproved real property.

H. R. 2944 ..... To provide for the reimbursement of the Borough of Ringwood, New Jersey, for loss of taxes on certain property acquired by the United States.

H. R. 5223 ..... Establishing a general policy with respect to payments to State and local governments on account of Federal real property and tangible

Federal Power Commission

16 U. S. C. 810	Thirty-seven and one-half percent of the funds derived from licenses issued for occupancy and use of national forests and public lands shall be paid to the states in which they are located

Tennessee Valley Authority

16 U. S. C. 831l	Payments shall be made to states and counties equal to five percent of the gross proceeds from the sale of power, in lieu of taxes on property franchises and income.

personal property" by providing for the taxation of certain Federal property and for payments in connection with certain other Federal property, and for other purposes.

H. R. 8454 ... To provide for State and local taxation of real property which is owned by the United States and leased to private persons, and to prevent the leasing of real property owned by the United States for uses which violate State and/or local law, and for other purposes.

83rd Congress

S. 526 ... To establish a national Commission on intergovernmental relations.

S. 788 ... Establishing a general policy and procedures with respect to payments to State and local governments on account of Federal real property and tangible personal property and for other purposes.

S. 1328 ... To establish a temporary national Commission on intergovernmental relations.

S. 1544 ... To establish a Commission of governmental functions and fiscal resources.

S. 2173 ... To provide for payments by the Federal government to States or local taxing units adversely affected by Federal acquisition, ownership, or use of defense production facilities, to provide for the taxes of certain Federal properties and for other purposes.

H. R. 206 ... Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes.

H. R. 276 ... To provide for local taxation of real estate and improvements thereon owned by the United States.

H. R. 327 ...
H. R. 2092 ...
H. R. 2103 ... } Establishing a general policy with respect to payments to State and local governments on account of Federal real property and tangible personal property by providing for the taxation of certain Federal property and for payments in connection with certain other Federal property, and for other purposes.

H. R. 268 ..... To provide for the reimbursement of the States and their political subdivisions for the loss of tax revenue with respect to certain real property, and improvements thereon, acquired by the United States and used by the Armed Forces for recreational and welfare purposes.

H. R. 466 ..... Providing that certain real property, together with improvements thereon, acquired for military purposes or for house projects, national parks, or monuments, shall not be exempt from taxation by the States and their political subdivisions.

H. R. 2572 .....

H. R. 508 ..... Creating a Commission on Federal reimbursement to States and local governments by reasons of Federal ownership of improved and unimproved real property.

H. R. 552 ..... To provide for the reimbursement of the town of Lancaster, Massachusetts, for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.

H. R. 1062 ..... To provide for State and local taxation of real property which is owned by the United States and leased to private persons, and to prevent the leasing of real property owned by the United States for uses which violate State and/or local law, and for other purposes.

H. R. 1863 ..... To provide for payments to the States with respect to certain lands of the United States.

H. R. 4460 ..... To provide for payments in lieu of taxes to be made to local taxing authorities with respect to Federal real property.

H. R. 5937 ..... Permitting the State and local taxation of certain tangible personal property title to which is in the United States.

H. R. 6531 ..... To provide for payments by the Federal government to States or local taxing units adversely affected by Federal acquisition, ownership, or use of defense production facilities, to provide for the taxation of certain Federal properties, and for other purposes.

H. R. 7401, H. R. 7782 — To provide for payments by the Federal Government to States or local taxing units adversely affected by Federal acquisition, ownership, or use of defense-production facilities, to provide for the taxation of certain Federal properties and for other purposes.

H. R. 9065 — A bill to provide for payments to States and territories and local governmental units thereof, and to the District of Columbia in lieu of real property taxes, with respect to certain real property owned by the Federal government.

84th Congress

S. 826 — To provide for payments by the Federal government to State or local taxing units adversely affected by Federal acquisition, ownership, or use of defense production facilities, to provide for the taxes of certain Federal properties, and for other purposes.

S. 888 — To make a temporary provision for the payment of taxes or the making of payments in lieu of taxes with respect to certain real estate held by government corporations or transferred by them to other government agencies, and for other purposes.

S. 1566 — Establishing a general policy and procedure with respect to payments to State and local governments on account of Federal real property and tangible personal property and for other purposes.

S. 1657 — To authorize taxes of certain Federal property by State and local tax authorities, to provide for the payment by Federal agencies of sums in lieu of taxes with respect to certain other Federal property, and for other purposes.

S. 2100 — To prohibit agencies of the United States from entering into contracts under which private contractors are constituted agents of the United States to purchase property necessary to carry out such contracts.

S. 2377	To amend the Federal Property and Administrative Services Act of 1949 to make temporary purchases for making payments in lieu of taxes with respect to certain real property transferred by Reconstruction Finance Corporation and its subsidiaries to other government departments.
S. 2390	To consent to the taxes of certain Federal property by State and local tax authorities, to provide for the payment to such authorities of sums in lieu of taxes with respect to certain other Federal property.
S. 2754	To authorize the taxation of certain Federal real property by State and local tax authorities.
S. 3534	To provide for payments in lieu of taxes to State tax authorities with respect to certain real property subject at the time of its acquisition by the United States to real property tax committed to the discharge of bonded indebtedness for any public improvement.
S. 3785	To provide for the making of payments to State tax authorities with respect to Federal real property of amounts equal to the sums which would be paid as special assessments thereon for public improvements if such land were privately owned.
H. R. 342 H. R. 4883	Establishing a general policy with respect to payments to State and local governments on account of Federal real property and tangible personal property by providing for the taxation of certain Federal property and for payments in connection with certain other Federal property; and for other purposes.
H. R. 457	Create a Commission on Federal reimbursement to States and local governments by reason of Federal ownership of improved and unimproved real property.
H. R. 786	Providing for taxation by the States and their political subdivisions of certain real property owned by the United States of America or its agencies.
H. R. 2021	To provide for payments in lieu of taxes to be made to local taxing authorities with respect to Federal real property.

H. R. 2408.... Create a Commission on Federal reimbursement to States and local governments by reason of Federal ownership of improved and unimproved real property.

H. R. 2991.... To provide for the reimbursement of the town of Lancaster, Massachusetts, for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.

H. R. 4887.... To provide that Federal real property used primarily for the production of commodities commonly produced by private enterprise shall be subject to State and local real property taxation.

H. R. 7098....
H. R. 9536.... Establishing a general policy and procedure with respect to payments to State and local Governments on account of Federal real property and tangible personal property.

H. R. 8401.... To provide for local taxation of real estate and improvements thereon owned by the United States.

H. R. 11455... To provide for payments in lieu of taxes to State tax authorities with respect to certain real property subject at the time of its acquisition by the United States to real property tax committed to the discharge of bonded indebtedness.

H. R. 12167...
H. R. 12171...
H. R. 12173...
H. R. 12219... To authorize the payment to local governments of sums in lieu of taxes and special assessments with respect to certain Federal real property and for other purposes.

H. R. 1587.... To provide for payments by the Federal government to States or local taxing units adversely affected by Federal acquisition, ownership, or use of defense production facilities, to provide for the taxation of certain Federal properties, and for other purposes.

H. R. 1847.... To provide for payments to the States with respect to certain lands of the United States.

S. 6	To eliminate claims of immunity from State and local taxes based on contracts with the United States or its agencies or instrumentalities.
S. 30	To authorize the taxation of certain Federal real property by State or local tax authorities, and for other purposes.
S. 550	To provide for payments in lieu of taxes to State tax authorities with respect to certain real property subject at the time of its acquisition by the United States to real property tax committed to discharge of bonded indebtedness for any public improvement.
S. 967	To authorize payment to local governments of sums in lieu of taxes and special assessments with respect to certain Federal real property, and for other purposes.
S. 1104	Providing for the making of payments to the States and their political sub-divisions in lieu of taxes with respect to certain real property owned by the United States or its agencies.
S. 1573	To provide for the making of payments to state tax authorities with respect to Federal real property of amounts equal to the sums which would be paid as special assessments therefor for public improvements if such land were privately owned.
H. R. 256	Providing for taxation by the States and their political sub-divisions of certain real properties owned by the United States of America or its agencies.
H. R. 343	Creating a Commission on Federal reimbursement to States and local governments by reason of Federal ownership of improved and unimproved real property.
H. R. 631 H. R. 1196 H. R. 6568	Establishing a general policy with respect to payments to State and local governments on account of Federal real property and tangible personal property by providing for the taxation of certain Federal property and for payments in connection with certain other Federal property, and for other purposes.

H. R. 800	To provide for payments in lieu of taxes to be made to local taxing authorities with respect to Federal real property.
H. R. 1240	To provide for the reimbursement of the town of Lancaster, Massachusetts, for the loss of taxes on certain property in such town acquired by the United States for use for military purposes.
H. R. 2017	To authorize the payment to local governments of sums in lieu of taxes in special assessments with respect to certain Federal real property and for other purposes.
H. R. 5959	
H. R. 6469	To provide for payments in lieu of taxes to State tax authorities with respect to certain real property subject at the time of its acquisition by the United States to real property tax committed to the discharge of bonded indebtedness for any public improvement.

APPENDIX C

Congressional Hearings, Reports and Documents Relating to State Taxation of Federal Property

A PARTIAL LIST OF RECENT CONGRESSIONAL MATERIALS INDICATING THE ATTENTION CONGRESS HAS GIVEN TO THE PROBLEM OF PROVIDING LOCAL TAXING AUTHORITY WITH FUNDS ON ACCOUNT OF GOVERNMENT-OWNED TAX-EXEMPT PROPERTY

Hearings before the House Committee on Public Lands, H. R. 1288, H. R. 1305, H. R. 1578, H. R. 1658, H. R. 2246, H. R. 2338, H. R. 2724, H. R. 3119, H. R. 3161, H. R. 3166, H. R. 3359, H. R. 3424, 78th Cong., 1st Sess., Extension of Federal Liability to Localities for Real Estate Taxation or Payments in Lieu Thereof.

Hearings before the House Committee on Ways and Means, H. R. 10, 80th Congress, 1st Session, State Taxation of Federal Property.

Joint Hearings before the Subcommittees on Intergovernmental Relations of the House and Senate Committees on Expenditures in the Executive Departments, S. J. Res. 41, S. 767, S. 810, H. R. 2389, H. R. 3184, H. R. 3944, H. R. 4507, 81st Cong., 1st Sess., Establishment of a National Commission on Intergovernmental Relations.

Hearings before the Senate Committee on Government Operations, S. 1146, 82nd Cong., 1st Sess., To Establish a Temporary National Commission on Intergovernmental Relations.

Hearings before the Senate Committee on Government Operations, S. 526, S. 1328, S. 1514, 83d Cong., 1st Sess., To Establish a National Commission on Intergovernmental Relations.

Hearings before the Senate Committee on Government Operations, S. 2473 and H. R. 5605, 83d Cong., 2d Sess., Payments in Lieu of Taxes to States or Local Taxing Units.

Hearings before the Senate Committee on Government Operations, S. 826, S. 888, S. 1366, S. 1657, S. 2100, S. 2377, S. 2390,

84th Cong., 1st Sess., Payments of Taxes, or in Lieu of Taxes, to State or Local Taxing Units.

Hearings before the Senate Committee on Government Operations, S. 826, S. 1566, S. 1657, S. 2100, S. 2390, S. 2754, S. 3534, 84th Cong., 2d Sess., Payments of Taxes, or in Lieu of Taxes, to State or Local Taxing Units.

H. Rep. 2094, 78th Cong., 2d Sess. Study on Public Lands Problems Relative to Taxation of Public-owned Property.

S. Rep. 488, 81st Cong., 1st Sess. Establishing National Commission on Intergovernmental Relations.

S. Rep. 1856, 81st Cong., 2d Sess. Establishing Temporary National Commission on Intergovernmental Relations.

S. Rep. 544, 82d Cong., 1st Sess. Establishing Temporary National Commission on Intergovernmental Relations.

S. Rep. 215, 83d Cong., 1st Sess. Establishing Commission on Intergovernmental Relations.

S. Rep. 1966, 83d Cong., 2d Sess. Payments in Lieu of Taxes to States or Local Taxing Units.

S. Rep. 2424, 84th Cong., 2d Sess. Authorizing the Payment to Local Governments of Sums in Lieu of Taxes and Special Assessments with Respect to Certain Federal Real Property.

S. Rep. 1, 85th Cong., 1st Sess., pp. 11–21. Activities of the Senate Committee on Government Operations, Intergovernmental Relations.

H. Doc. 111, 76th Cong., 1st Sess. Federal Ownership of Real Estate and its Bearing on State and Local Taxation.

H. Doc. 216, 78th Cong., 1st Sess. Federal Contributions to States and Local Government Units with Respect to Federally-Owned Real Estate.

S. Doc. 81, 81st Cong., 1st Sess. Federal-State Relations.

Committee Print No. 23, House Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. Report on Taxes and Other In-Lieu Payments on Federal Property.

APPENDIX D

Legislation Authorizing Taxation or Payments in Lieu of Taxes With Respect to Government-Owned Property

Following is a list of legislation (in effect as of 1954*) which provides for payments in lieu of taxes, authorizes taxation of otherwise immune property, or provides that revenue from Government-held property shall be shared with state or local authorities.

PROVISIONS FOR PAYMENTS IN LIEU OF TAXES ON FEDERAL PROPERTY

Atomic Energy Commission

42 U. S. C. 1869 (b)	Payments for property previously subject to taxation which has been acquired by the Commission

Department of Agriculture

58 Stat. 905	Payments for lands acquired in certain states for certain public works
16 U. S. C. 577g	Payments to the State of Minnesota for Superior National Forest lands
7 U. S. C. 1024	Payments for certain property held by the Farmers Home Administration.
40 U. S. C. 432-33 (1946 ed.); 50 App. U. S. C. 1355 (d) (1946 ed.)	Payments on resettlement or rural rehabilitation projects constructed with Resettlement Administration funds.

*This list is based on the Preliminary Report on Taxes and Other In-Lieu Payments on Federal Property prepared for the House Committee on Interior and Insular Affairs by the Legislative Reference Service, Library of Congress, and dated February 1, 1954. See Committee Print No. 23, 83d Cong., 2d Sess.

16 U. S. C. 590z–8	Payments on lands being prepared for irrigation and return to private ownership under the Case-Wheeler Act.

Department of the Interior

16 U. S. C. 835c–4	Payments with respect to any real property located on the Columbia Basin project.
16 U. S. C. 406d–3	Payments to the State of Wyoming for lands recently acquired in Grand Teton National Park.
53 Stat. 753–4	Payments for Reconveyed Coos Bay Wagon Road grant lands in Coos and Douglas Counties, Oregon.

General Services Administration

40 U. S. C. 490 (a) (9)	Payments for lands declared surplus by tax-paying government corporations.

Housing and Home Finance Agency

42 U. S. C. 1413 (c)	Payments for low-cost housing constructed by United States Housing Authority.
42 U. S. C. 1456 (c) (3)	Payments for property involved in slum clearance and community development.
42 U. S. C. 1546	Payments with respect to real property and improvements used for defense housing, etc., erected under the Lanham Act during World War II.
42 U. S. C. 1592g	Payments for real property and improvements acquired for housing in critical defense housing areas.
42 U. S. C. 1593 (b)	Payments for housing and community facilities needed in connection with isolated defense installations.
40 U. S. C. 422–3	Payments with respect to slum clearance and low-cost housing projects.

12 U. S. C. 1749a	Payments for housing at educational institutions on which loans made by the agency have been foreclosed.

PROVISIONS FOR STATE OR LOCAL TAXATION OF FEDERAL PROPERTIES

Department of Agriculture

15 U. S. C. 713a-5	Real property of the Commodity Credit Corporation shall be subject to taxation to the same extent according to its value as other real property
12 U. S. C. 931, 933, 1020f (a), 1111, 1138c	Property held for tenant purchase loans and mortgage insurance is subject to direct taxation like any other privately owned property
12 U. S. C. 1020f (a)	Real property of the Federal Farm Mortgage Corporation shall be subject to taxation to the same extent according to its value as other real property is taxed

Department of the Interior

16 U. S. C. 835c-1	Any public lands acquired in connection with the Columbia Basin project shall be subject to taxation in the same manner and to the same extent as privately owned lands

Department of Justice

50 App. U. S. C. 36	Property transferred to the Alien Property Custodian shall not be exempt from state or local tax laws

Federal Credit Unions

12 U. S. C. 1768	Real and tangible personal property of Federal credit unions shall be subject to taxation to the same extent as other similar property

Federal Deposit Insurance Corporation

12 U. S. C. 1825	Real property of Federal Deposit Insurance Corporation shall be subject to taxation to the same extent as other real property

Federal Home Loan Banks

12 U. S. C. 1433	Real property of Federal Home Loan Banks shall be subject to taxation to same extent according to its value as other real property

Federal Reserve Banks

12 U. S. C. 531	Real estate of Federal Reserve Banks shall be subject to state and local taxes

Federal Savings and Loan Insurance Corporation

12 U. S. C. 1725 (e)	Real Property of the Federal Savings and Loan Insurance Corporation shall be subject to taxation to the same extent as other real property

Home Owners Loan Corporation

12 U. S. C. 1463 (c) (1940 ed.).	Real property of the Home Owners Loan Corporation shall be subject to taxation to the same extent according to its value as other real property.

Housing and Home Finance Agency

12 U. S. C. 1714; 42 U. S. C. 1456 (c) (3).	Provides for taxation of real property acquired in connection with insurance under the National Housing Act loans, and loans for housing at educational institutions.

National Agricultural Credit Corporation

12 U. S. C. 548 (d) (3), 1261.	Real property of the National Agricultural Credit Corporation shall be subject to taxation to the same extent as other real property is taxed.

National Banks

12 U. S. C. 548 (d) (3).	Real property of national banks shall be subject to taxation to the same extent according to its value as other real property.

Reconstruction Finance Corporation

15 U. S. C. 607	Real property of the Reconstruction Finance Corporation shall be subject to special assessments for local improvements and shall be subject to state and local taxation to the same extent according to its value as other real property.

Veterans Administration

38 U. S. C. 694j (a) (6).	Property acquired by the Veterans Administration under the law with respect to loans to veterans shall not be exempt from taxation.

PROVISIONS FOR REVENUE-SHARING AFFECTING FEDERAL PROPERTIES

Department of Agriculture

16 U. S. C. 500	Twenty-five percent of all moneys received from each national forest shall be paid to the state in which the national forest is located.
36 Stat. 562, 573, sec. 6, 24.	Such proportion of the gross proceeds of all national forests located within Arizona and New Mexico as the area of lands granted for school purposes bears to the total area of all national forests in each of the two states shall be paid to each.

7 U. S. C. 1012	Twenty-five percent of the net revenues received from use of submarginal land held by the Soil Conservation Service shall be paid to the counties in which such lands are situated.

Department of Defense

33 U. S. C. 701c (3)	Seventy-five percent of moneys received from lease of lands acquired for flood-control purposes shall be paid to the states in which such property is located.

Department of the Interior

31 U. S. C. 711 (17); 43 U. S. C. 391, 1187.	Five percent of the net proceeds from the sale of public lands shall be paid to the states in which such lands are located.
48 U. S. C. 353	The entire income derived from sale of timber and disposition of public lands in Alaska shall be reserved for school and other educational purposes.
43 U. S. C. 315b, 315i	Twelve and one-half percent of the grazing-fee receipts from public lands within grazing districts are paid to the states.
43 U. S. C. 315i, 315m	Fifty percent of the grazing-fee receipts from public lands outside grazing districts are paid to the states.
43 U. S. C. 315j	Thirty-three and one-third percent of the fees from grazing districts on Indian lands ceded to the United States are paid to the states.
39 Stat. 218; 50 Stat. 875-6.	Fifty percent of the receipts of the Oregon and California land-grant funds, plus the unearmarked portion of an additional twenty-five percent are paid to the Oregon counties in which the lands are situated.

53 Stat. 753–4	Up to seventy-five percent of the receipts from reconveyed Coos Bay Wagon Road grant lands may be paid to Coos and Douglas Counties, Oregon.
30 U. S. C. 191, 275, 285 286, 292.	Thirty-seven and one-half percent of the receipts in bonuses, royalties, and rentals under the Mineral Leasing Act are paid to the states and Alaska.
42 Stat. 1448; 44 Stat. 740; 48 Stat. 1227, sec. 4.	Thirty-seven and one-half percent of the oil and gas royalties from oil and gas lands in the south half of Red River, Oklahoma, shall be paid to the state in lieu of state and local taxes on certain tribal funds.
47 Stat. 1418	Thirty-seven and one-half percent of the net royalties from oil and gas lands added to the Navajo Indian Reservation in Utah shall be paid to Utah.
43 U. S. C. 617c, 618–618c.	A certain sum of the revenues from the operation of the Boulder Canyon project is appropriated to Arizona and Nevada.
16 U. S. C. 715s	Twenty-five percent of the net proceeds from the sale of wildlife refuge products and privileges are paid to the counties in which the refuges are located.
16 U. S. C. 669–669i	A sum equal to the revenue from the excise tax on firearms, shells, and cartridges is distributed among the states for wildlife restoration
16 U. S. C. 777–777k	A sum equal to the revenue from the excise tax on fishing rods, etc., is distributed among the states for fish restoration
48 U. S. C. 199 (k)	Fifty percent of the net proceeds from the sale of various game licenses and permits in Alaska are paid to the Territory

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 26

UNITED STATES OF AMERICA
and
BORG-WARNER CORPORATION (DETROIT GEAR DIVISION),
Appellants,
vs.
CITY OF DETROIT, a Municipal Corporation,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

QUESTION PRESENTED

We accept the introductory statement to the question presented on page two of appellants' brief with two additions which we have emphasized in restating it.

The City of Detroit has assessed and collected taxes from a lessee of the United States (Borg-Warner) pursuant to a state statute which directs that taxes shall be

collected from a lessee or user of tax-exempt realty *used in connection with a business conducted for profit* "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso in the statute creates an exception should the United States make an equivalent payment in lieu of these taxes. *The statute also makes certain other exceptions which we shall discuss later in this brief.* The statute further provides that the taxes shall constitute a debt of the lessee or user to the taxing unit but shall not become a lien against the property.

Apparently, appellants have decided that the five questions presented in their jurisdictional statement on pages 3-5 can and should be merged into the following single question which they state in their brief on page 2 is the question presented in this case:

> "Whether Michigan Public Act 189 of 1953, on its face and as here applied, is unconstitutional in that it invades the immunity of federal property from taxation by the states."

We are in accord with their view and accept the single question, above stated, as the question presented in this case.

STATEMENT

Appellee accepts the statement in appellants' brief on pages 2-9 with the following additions:

Appellants state on page 4 of their brief: "Such valuation was set down upon the personal property tax rolls of the City of Detroit (R. 97), and a tax bill, characterizing the subject of the tax as personal property (R. 2, 11, 14) was issued to Borg-Warner (for the year 1954) in the amount of $12,323.50, a sum more than 3.5% of the assessed valuation."

It should be observed and we wish to add that the personal property assessment roll (referred to above by appellants as the personal property tax rolls) carried the notation, "Leased Land Bldg. Act 189 P. A. 1953" (Defendant's Exhibit 2, R. 97). The tax bill issued to Borg-Warner also carried the same notation (R. 11), and it is stated in plaintiffs' declaration that, "Said tax bill recites that the tax so levied was assessed under the provisions of Act 189, Public Acts of 1953, of the State of Michigan" (R. 2).

We also wish to add that a witness for appellee testifying in relation to the above described assessment roll (Defendants' Exhibit 2, R. 97) gave testimony as to the owner and lessee of each of the four parcels shown on the assessment roll, testifying that the owners of each were the United States of America or a municipal corporation of the State of Michigan (R. 33).

We further add that it was stipulated that the tax was assessed, levied and billed to Borg-Warner in conformity with the provisions of Act 189, by the City of Detroit (R. 34).

SUMMARY OF ARGUMENT

The United States owns certain real property which it leased to Borg-Warner. The City of Detroit, appellee, taxed Borg-Warner under the provisions of Act 189 P. A. Michigan 1953 (set forth hereinafter under "History of Act 189") in the same amount and to the same extent as though it were the owner of such property.

Appellants contend that Act 189 is unconstitutional because it actually imposes an ad valorem tax on the immune property of the United States, since the full value of the property is used as a measure of the tax.

Appellee contends that Act 189 imposes a specific tax (similar to an excise tax) on Borg-Warner for the privilege of using the tax-exempt property in connection with a business conducted for profit and that such a tax may be measured by the full value of the United States property.

Since Act 189 does not expressly provide for an ad valorem tax "on the property", or a tax on the "lessee's interest" or a tax on the "privilege of using" the property, we must look to the intention of the legislature to determine the nature of the tax.

The Michigan Supreme Court held that Act 189 manifested an intention on the part of the legislature to eliminate a discrimination between users of private and public property and that the tax imposed under the Act is a specific tax on the privilege of using the United States property in connection with a business conducted for profit, which tax may be measured by the full value of the United States property.

That such a privilege tax may be measured by the full value of United States property is supported by *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931) and *Esso Standard Oil v. Evans*, 345 U. S. 495 (1953).

The direct burden or incidence of the tax under Act 189 is on Borg-Warner and not the United States or its property and the tax does not interfere in any substantial way with the performance of federal functions. Section two of the Act provides that the taxes shall be assessed to the lessee or user of the tax-exempt property; that they shall not become a lien against the property; and, that when due they shall constitute a debt due from the lessee or user recoverable by direct action of assumpsit.

The fact that the indirect economic burden of the tax was passed on to the United States by agreement under the amendment to the lease (R. 93) is no longer fatal to the tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Esso Standard Oil v. Evans*, 345 U. S. 495, 499 (1953).

The tax under Act 189 is not discriminatory. Subject to the exceptions therein specified, it applies to all tax-exempt real property used in connection with a business conducted for profit, whether such property is owned by the United States, the State of Michigan or any of its political subdivisions, or by hospitals, churches or other charitable institutions.

The fact that Act 189 provides for certain exceptions does not make it discriminatory. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 509-510 (1937).

Appellants rely principally on *United States v. Allegheny County*, 322 U. S. 174 (1944), which they cite on fourteen pages of their brief, but that case is distinguishable from the case at bar in that it involved an ad valorem

general property tax statute and not a statute providing for a tax on a privilege, such as involved in the case at bar.

ARGUMENT

Appellants contend on page 10 of their brief that "Since *McCulloch v. Maryland*, 4 Wheat. 316, it has been settled constitutional doctrine that property of the United States is beyond the taxing power of the states."

They further contend on page 14 of their brief that "Since *James v. Dravo Contracting Co.*, 302 U. S. 134, in which the United States supported the constitutionality of the state tax involved, it has also been settled that non-discriminatory state taxation of those with whom the Federal Government chooses to deal (e. g., contractors or suppliers) does not interfere 'in any substantial way with the performance of federal functions' (p. 161) merely because there may be indirect economic effect, i. e., passing some or all of the tax along to the Government as consumer."

We propose to show that the tax under Act 189 is not imposed upon any property of the United States; that it is not discriminatory and does not interfere in any substantial way with the performance of federal functions even though the United States bears the indirect economic burden of the tax which is passed on to it under the amendment to the lease (R. 93).

We also propose to show that the tax under Act 189 is a specific tax imposed upon the lessee (Borg-Warner) for the privilege of using the tax-exempt property in a business conducted for profit, which tax may be measured by the full value of the government property.

History of Act 189 P. A. Mich. 1953 (Mich. Stat. Ann. 7.7(5) and 7.7(6))

Act 189 originated in House Bill 46 which was amended in the House to read as follows:

> "A bill to provide for the taxation of lessees and users of tax-exempt property.
>
> *The People of the State of Michigan enact:*
>
> Sec. 1. When any property, real or personal, which for any reason is exempt from taxation, is leased, loaned or otherwise made available to and used by a private individual, association or corporation engaged in business for profit, *the lessee or user of such property* shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes and in amounts equivalent to taxes which might otherwise be lawfully assessed." (Emphasis supplied.)

The bill, as amended, passed the House by a unanimous vote on March 16, 1953. House Journal No. 36, p. 401.

The bill was amended in the Senate and broken into two sections. The words "the lessee or user of such property", inserted in parentheses below were apparently inadvertently omitted. In any event the bill as it emerged from the Senate and as again passed by the House, read as follows:

> "AN ACT to provide for the taxation of lessees and users of tax-exempt property.
>
> *The People of the State of Michigan enact:*
>
> Section 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private

individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, (the lessee or user of such property) shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for wihch payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution. (Words in parentheses supplied.)

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

The Act was adopted in both Houses without a dissenting vote. Senate Journal No. 77, p. 1255; House Journal No. 81, p. 1602.

Methods of Taxation in Michigan

Under the Constitution of Michigan there are two general methods of taxation—ad valorem and specific. *Pingree v. Auditor General*, 120 Mich. 95, 108 (1899); *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659, 673 (1935).

One of the definitions of ad valorem taxes, given in the *Pingree case* (p. 99), *supra*, which is similar to that given in *Cooley on Taxation*, Vol. 1 (4th Ed.) p. 143, is:

> "Ad valorem—according to value—* * * An ad valorem tax is a tax or duty upon the value of the article or thing subject to taxation."

One of the definitions of specific taxes given in the *Pingree case* (p. 98) *supra*, is Cooley's definition, which may also be found in his work on Taxation, Vol. 1 (4th Ed.) p. 143 from which we quote:

> "'A specific tax is one which imposes a specific sum by head or number, or by some standard of weight or measurement, and which requires no assessment beyond a listing and classification of the subjects to be taxed."

A specific tax need not be proportional to the value of the thing taxed. *Shivel v. Kent County Treasurer*, 295 Mich. 10, 18 (1940).

License taxes, privilege taxes and occupation taxes are specific taxes and not ad valorem taxes upon property. *C. F. Smith v. Fitzgerald, supra.*

Cooley's definition of a specific tax, quoted above, was considered in *Union Trust Co. v. Probate Judge*, 125 Mich. 487 (1901), where the trust company petitioned the court for a writ of prohibition to restrain the probate judge of Wayne County from enforcing the provisions of the inheritance tax law (Act 188 P. A. Mich. 1899). Under that law the value of the property in the estate was used as a measure of the tax.

The Attorney General conceded that if the inheritance tax is a tax upon property, it is in violation of Sec. 11, Article 14 of the Michigan Constitution of 1850 (now Section 3, Art. 10 of Mich. Const. of 1908), unless it can be called a specific tax. Sec. 11, Article 14 provided that "The legislature shall provide a uniform rule of taxation except on property paying specific taxes. * * *"

The main point for determination was whether the inheritance tax law imposed an ad valorem tax on property or whether it imposed a specific tax on the privilege of inheritance or succession.

In holding the law valid as imposing a specific tax on the inheritance or succession and not an ad valorem tax on the property, the Court said:

> "The conclusion that this statute imposes an *ad valorem* tax upon property can only be avoided by saying that it is not a tax upon the property, and that, therefore, the *ad valorem* feature, which, so far as assessment upon the value is concerned, is certainly present is wanting, because it is not an assessment upon the value of the property taxed. In short, the claim of the respondent is that this is a tax upon a privilege, viz., the privilege of succession, and that there is a legal distinction between a tax upon the property itself, assessed upon the basis of its value, and a tax upon this privilege, assessed upon the basis of *its* value, which is measured by the value of that which is the subject of the privilege, viz., the property. Unless this is a distinction without a substantial difference, the respondent is right."

Intention of Legislature

Although the words "the lessee or user of such property" were inadvertently omitted from Section 1 of the Senate version of the bill, which was finally adopted as Act 189 (see under heading "History of Act 189 P. A. Mich. 1953", *supra*) it is clear from a reading of the Act as a whole "who" the legislature intended to tax. This is evident in the title of the Act which reads:

> "An Act to provide for the taxation of *lessees and users* of tax-exempt property." (Emphasis supplied.)

A reading of Section 2 of the Act removes all doubt, if any existed, as to "who" is being taxed. It provides:

> "Taxes shall be *assessed to such lessees or users* of real property and collected in the same manner as taxes assessed to owners * * *." (Emphasis supplied.)

As to "what" is being taxed is also clear from a reading of the Act as a whole. The Act discloses that it was the intention of the legislature to impose a *specific tax on the lessees and users of tax-exempt real property for the privilege of using that property "in connection with a business conducted for profit."*

Act 189 does not expressly provide for an ad valorem tax "on the real property", nor does it expressly provide for taxing either the "lessee's interest" or the "privilege of using" the tax-exempt real property. It does provide, however, that in connection with a business conducted for profit the lessee or user of such property "shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property."

Such a provision is not unreasonable, because ordinarily a lessee of private property bears the entire burden of the taxes which are either included in the rent or paid by the lessee in addition thereto. Furthermore, it evidences an intent on the part of the legislature to eliminate a discrimination between users of private and public property. In this connection the Supreme Court of Michigan said in *United States v. City of Detroit*, 345 Mich. 601, at pages 610-611:

> "As defendant in the instant case properly points out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon either by direct payment thereof under lease requirements or by pay-

ment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and eliminating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally. It is obvious that each of the cases cited by plaintiffs, as just above considered, is distinguishable from the instant case because in each of them either a local tax was sought to be imposed directly on immune property or income as such, or the sole purpose of the tax act was to reach it indirectly, whereas here, as previously considered, the tax is not on the immune property but on the privilege of using it, and the act imposing it is not aimed at that property but, rather, at removig a discrimination between users of private and of public property."

While we appreciate that the construction placed upon a state statute by a state court is not binding on this court in deciding a federal constitutional question, nevertheless, it will be given great weight. This court said in *Clyde v. Gilchrist*, 262 U. S. 94, 97 (1923):

> "* * * when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment if there was no real oppression or manifest wrong in the result."

Appellants say on page 25 of their brief: "There is further eloquent testimony of this statute's purpose—the proviso clause of Section 1, which states in substance that the tax (though ostensibly upon the lessee) will be

forgiven if the United States makes a payment 'equivalent' to the tax. Michigan itself has thus recognized that under Act 189 the United States is the real taxpayer."

The exact wording of the proviso clause referred to by appellants is: "That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed * * *."

Michigan does not recognize by such a proviso that the United States is the real taxpayer for the proviso is not inconsistent with the purpose and intention of the legislature which, as noted above, is to put lessees of private property and lessees of tax-exempt government property, used in connection with a business conducted for profit, on an equal footing. If the United States makes a payment equivalent to taxes then the above mentioned purpose has been accomplished. The fact that the United State may assume the indirect economic burden of the tax will no longer invalidate the tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Esso Standard Oil v. Evans*, 345 U. S. 495, 499 (1953).

The Tax Under Act 189, Being a Tax on a Privilege, May Be Measured by the Full Value of the United States Property

It has long been settled that a tax on a privilege may be measured by the full value of tax-exempt property.

In *Plummer v. Coler*, 178 U. S. 115 (1900) the court held a New York inheritance tax valid even though measured by the full value of tax-exempt United States bonds included in a bequest. The tax was held to be on the privilege of inheritance and not on the United States bonds.

In *Home Insurance Co. v. New York*, 134 U. S. 594 (1890), a corporation franchise tax measured by the corporation's dividends and capital stock which included tax-exempt United States bonds was held valid. In upholding the tax as a tax on the franchise and not on the United States bonds the court quoted with approval from *Society for Savings v. Coite*, 6 Wall. 594 (1868):

> "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government. Authority to that effect resides in the state independent of the federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities."

In *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931), a New York statute provided for an annual franchise tax on certain classes of domestic corporations for the privilege of doing business in the state. The tax was payable in advance for each year beginning November 1st at 4½% of the corporation's entire net income for its preceding fiscal year allocated to business carried on in the state.

The corporation challenged the tax assessed against it for the year beginning November 1, 1929 claiming that since the income upon which the tax is based includes royalties from United States copyrights which are federal instrumentalities, the tax is void.

In holding the tax valid as a tax on the privilege of doing business in the state and not a tax aimed at the federal copyrights the court said at page 388:

> "*If we look to the operation of the present statute, it is plain that it can have no application independ-*

ent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise." (Emphasis supplied.)

The Court further said at page 389:

"While this court since *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other (citing cases), it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

The precise question now presented was definitely answered in *Flint v. Stone Tracy*, 220 U. S. 107, 162 *et seq.*, 55 L. ed. 389, 417, 31 S. Ct. 342, Ann. Cas. 1912B, 1312, which upheld a Federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the court reaffirmed the distinction, repeatedly made in earlier decisions, be-

> tween a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income. (Citing cases.)"

The Court, also, on page 393, quoted with approval from *Miller v. Milwaukee*, 272 U. S. 713 (1927):

> "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them."

Like the *Educational Films Corp. case, supra*, the tax imposed under Act 189 can have no application independent of the tax-exempt property, being *used* "in connection with a business conducted for profit." If the tax is "on the property" as contended by appellants, it would apply regardless of whether the property is *used* or not.

Also, like the *Educational Films case*, even though the tax imposed under Act 189 has a casual effect on the United States in that it bears the indirect economic burden of the tax which was passed on to it by amending the lease (R. 93), the tax was not aimed at the United States or its property, but was passed with a different intent, namely, to avoid discrimination between users of private and public property, as heretofore shown.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911) and *Pacific Company v. Johnson*, 285 U. S. 480 (1932), corporate franchise taxes were upheld which were measured by income from tax-exempt municipal bonds.

Appellants contend that Act 189 is "special legislation" aimed at federal property and they cite *Miller v. Milwaukee*, 272 U. S. 713, in support of their position.

In that case Miller held stock in a Wisconsin corporation which owned tax-exempt United States bonds. The Wisconsin statute required the corporation to pay a tax on its income, but not on the interest or income derived from tax-exempt United States bonds. The interest on the United States bonds was credited to the corporation surplus account and later distributed to stockholders as dividends. The Wisconsin statute taxed the stockholders on the dividends only to the extent that they represented income of the corporation derived from the tax-exempt United States bonds. The court held the tax on the stockholders void because it was aimed solely at the United States bonds. The court was careful to point out, however, that "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them."

The *Miller case* is distinguishable from the case at bar in that it did not involve a privilege or franchise tax. Also, in the case at bar, Act 189 was not aimed at the United States or its property, but was passed with a different intent, namely, to avoid discrimination between users of private and public property.

Appellants also cite *Macallan Co. v. Massachusetts*, 279 U. S. 620, in support of their contention.

In that case the original Massachusetts statute excepted interest from United States bonds in determining net income for purposes of measuring a franchise tax on domestic corporations. The statute was later amended to include tax-exempt securities in the measure of the franchise tax. The court in holding the tax invalid, said the amendment was specifically intended to reach the income from the tax-exempt United States bonds which had previously not been included in the measure of the tax. The court

also quoted with approval from *Miller v. Milwaukee*, 272 U. S. 713: "A tax very well may be upheld as a against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them * * *."

The Macallan case is distinguishable from the case at bar on one of the grounds that distinguished the *Miller case, supra*, namely, Act 189 was not aimed at the United States or its property, but was enacted to avoid discrimination between lessees of private and public property.

Appellants seek to show on pages 20-21 of their brief, by hypothetical cases of A, B and C, that Act 189 imposes a tax "on the whole of the property" and not on the "interest as may be in the lessee" because the tax is identical or equal to a tax on the property in all three hypothetical cases.

We will agree that the tax is not on the lessee's interest, but it is not on the property either. It is on the "beneficial personal use of the property" which this Court said in *United States v. Allegheny County*, 322 U. S. 174, 188 (1944), may be taxed.

As heretofore noted, the tax under Act 189 is a specific tax on the privilege of using the property. A specific tax need not be proportional to the value of the thing taxed. *Shivel v. Kent County Treasurer*, 295 Mich. 10, 18 (1940).

Since a specific tax is not required to be proportional to the value of the thing taxed which, in this case, is the privilege of using the property, the legislature can impose an amount which it considers reasonable for the privilege, in order to accomplish the result intended. The result intended by the legislature was to avoid discrimination between lessees of private and public property. Under such circumstances, it cannot be properly concluded that the tax is "on the whole of the property" merely because it equals a tax on the property.

Esso Standard Oil v. Evans Is Analogous

The case of *Esso Standard Oil v. Evans*, 345 U. S. 495 (1953) is analogous to the case at bar.

In that case, the United States entered into a contract with Esso to store government gasoline in its tanks. The gasoline was specifically exempt from state storage and use taxes under 55 Stat. 248. The State of Tennessee, under its statute, levied a privilege tax on Esso of 6 cents for each gallon of gasoline stored which amounted to $196,000.00. The United States intervened and claimed that the *Esso case* was analogous to *United States v. Allegheny County*. It said, in effect, that the tax in the *Esso case* is no less "on" the property of the United States than it was in the *Allegheny case*. The court was told that if the tax is sustained a liability of upwards of $4,000,000 will result. In holding the tax valid the court said at page 499:

> "This tax was imposed because Esso stored gasoline. It is not, as the Allegheny County tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not, 'on' the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James v. Dravo Contracting Co.*, 302 U. S. 134, 151, 82 L. ed. 155, 167, 58 S. Ct. 208, 114 A. L. R. 318, this has been no fatal flaw."

In the *Esso case*, Tennessee taxed the "privilege of storing" tax-exempt property in connection with a business for profit. Act 189 taxes the "privilege of using" tax-exempt property in connection with a business con-

ducted for profit. In each case the tax is on a "privilege" measured either by the quantity or worth of the tax-exempt property. It is not on the property itself. There would appear to be no distinction between "quantity" or "worth" because in each instance the tax-exempt property itself is the measure of the tax on the privilege.

It will be noted in the above quotation from the *Esso case* that the court stated: "It is not, as the Allegheny County tax was, based on the worth of the government property."

We do not believe the Court meant by that statement that if the tax on the privilege of storing government gasoline was measured by the worth of the gasoline instead of the quantity stored that the tax in the *Esso case* would be void, because to attribute such a meaning to the statement would be contrary to the decisions in the *Plummer, Home Insurance and Educational Films cases*, heretofore discussed, which hold that a tax on a privilege may be measured by the value or worth of tax-exempt government-owned property. Rather, we believe that the court was seeking to point out the difference between a statute which imposes a tax on a privilege which may be measured by the value or worth of government-owned property and an ad valorem general property tax statute, such as involved in the *Allegheny County case*, which does not provide for a tax on a privilege, but imposes a tax directly on the property itself.

United States v. Allegheny County Distinguishable

Appellants rely heavily on *United States v. Allegheny County*, 322 U. S. 174 (1944), as the government did in the *Esso case*, *supra*, and they cite it on fourteen pages of their brief.

The *Allegheny County case*, however, is distinguishable from the case at bar in that it involved an ad valorem general property tax statute and not a statute providing for a tax on a privilege, such as involved in the case at bar.

In that case, the United States entered into a contract with the Mesta Machine Company to manufacture large field guns for the government. It leased certain machinery to Mesta for that purpose. The machinery was installed in the Mesta plant. Allegheny County included the value of the government-owned machines in assessing Mesta's real property under a Pennsylvania ad valorem general property tax statute.

In holding that the tax was on the immune property of the United States and therefore void, the Court said at pages 184-188:

> "It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. * * * This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment. (Emphasis supplied.)

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: 'The following *subjects and property* shall * * * be valued and assessed, and *subject to taxation.*' 'Taxes are declared to be a *first lien on said property.*' (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. * * *

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States. * * *

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * *

We think, however, that the government's property interests are not taxable either to it or to its bailee. The 'government' is an abstraction, and its possession of property largely constructive. Actual possession and cutody of government property nearly always are in someone who is not himself the government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. *His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held.* But neither he nor the government can be taxed for the government's property interest." (Emphasis supplied.)

The Michigan Supreme Court, after analyzing and quoting the above language from the *Allegheny County case*, held that it was distinguishable from the case at bar

and said in *United States v. City of Detroit*, 345 Mich. at pages 607-608:

> "Thus, the Michigan act provides that it is the users of tax-exempt property who shall be subject to taxation as contrasted with the Pennsylvania act considered in *Allegheny*, which provided that certain property should be subject to taxation. In further contrast with *Allegheny* and stated in the converse of the language therein, the tax at bar is a form of personal taxation and not a tax against the property as a thing—its procedures are more analogous to procedures *in personam* than *in rem*—the power to tax is not predicated upon jurisdiction of the property, but upon jurisdiction of the user—the property is not the subject of the tax and does not stand as security for its payment. These distinctions between *Allegheny* and the case at bar we think go to the roots of the problem of the nature of the taxes in the 2 cases and leave the holding in *Allegheny* that the tax there was on United States property without application here. * * * the tax is, therefore, not an ad valorem tax on real property of United States and void accordingly, but a specific tax on Borg-Warner's privilege of using it and hence valid. This squares with the above-quoted language from *Allegheny* to the effect that Mesta enjoyed a right of possession which the court seemed to suggest, without deciding, could be taxed by the state, and the further statement that it had theretofore held that a contractor's personal advantages from the beneficial personal use of United States property may be taxed by a state. That the economic burden of the tax, as distinguished from its legal incidence happens to fall on United States is no barrier to its validity. James v. Dravo Contracting Co., 302 U. S. 134, (58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 918); Alabama v. King & Boozer, 314 U. S. 1 (62 S. Ct. 43, 86 L. ed. 3, 140 A. L. R. 615); Esso Standard Oil Co. v. Evans, 345 U. S. 495 (73 S. Ct. 800, 97 L. ed. 1174)."

While the decision in the *Allegheny case* is distinguishable from the case at bar, some of the statements of the court therein contained support appellee's position, as noted above.

Fourteenth Amendment Not Violated

Appellants contend on page 22 of their brief that Act 189 violates the Fourteenth Amendment. They say, "It may be added, that even if viewed as a tax upon the lessee, the statute would suffer from a constitutional infirmity, for it invokes a conclusive presumption which is wholly arbitrary and must fall under the Fourteenth Amendment; the presumption that the bundle of rights enjoyed by a lessee of tax-exempt property has the same value as the fee itself."

There might be some merit to appellants' contention if Act 189 imposed a tax on the lessee's interest, but, as heretofore demonstrated, Act 189 imposes a specific tax on the privilege of using tax-exempt real property in connection with a business conducted for profit and not a tax on the lessee's interest in the property.

Section 6 of the Military Leasing Act of 1947 Not Applicable

On Page 19 of appellants' brief they refer to Section 6 of the Military Leasing Act of 1947 (34 U. S. C. 1952 ed., Sec. 522e). They contend that under this section the United States waived immunity from taxation by making the "lessee's interest" subject to state or local taxation. They further contend that the lessee's interest may not be measured by the full value of the United States property.

We agree with appellants that Section 6 makes the "lessee's interest" subject to state and local taxation and there might be some merit to their contention that the "lessee's interest" may not be measured by the full value of United States property, but Act 189 does not tax the "lessee's interest." It imposes a specific tax on the privilege of using tax-exempt property in connection with a business conducted for profit.

The Military Leasing Act of 1947 does not prohibit a specific tax on the privilege of using United States property and, to our knowledge, there is no other legislation that prohibits such a tax.

The Direct Burden or Incidence of the Tax Under Act 189 is on Borg-Warner and Not the United States or Its Property

It is clear from a reading of Act 189 that the direct burden or incidence of the tax falls upon the lessees or users of the tax-exempt property and not upon the United States or its property and that the tax does not interfere in any substantial way with the performance of federal functions.

Section 2 of Act 189 provides for the assessment and collection of taxes:

> "Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

Under this section the United States is not assessed for the taxes and there is no lien imposed upon its property. The liability for payment of the taxes is on Borg-Warner and not the United States. In the event of default in payment of the taxes, they are recoverable by a direct action of assumpsit against the lessee (Borg-Warner) and not the United States.

Thus, Act 189 revamped customary assessment procedure from *in rem* to *in personam*. No jurisdiction was sought over the property of the United States by lien, or over the United States itself by process of any kind.

The land and buildings leased by Borg-Warner were entered on the personal property assessment roll of the City of Detroit for 1954 but with this notation: "Leased Land Bldg. Act 189 P. A. 1953" (Defendant's Exhibit 2, R. 97); thus calling attention to the fact that the assessment was subject to the provisions of Act 189 and not the general property assessment laws which are applicable to property appearing on personal property assessment rolls.

The tax bill sent to Borg-Warner also carried the same notation, namely, "Leased Land Bldg. Act 189 P. A. 1953" (R. 11).

As heretofore noted, while the United States bears the indirect economic burden of the tax which is passed on to it by agreement under the amendment to the lease (R. 93) this will not invalidate the tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Esso Standard Oil v. Evans*, 345 U. S. 495, 499 (1953).

The Tax Under Act 189 Is Not Discriminatory

Subject to the exceptions therein specified, Section 1 of Act 189 provides in part:

> "When *any* real property which for *any reason is exempt* from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, * * * the lessee or user of such property shall be subject to taxation * * *." (Emphasis supplied.)

Thus, Act 189 applies to all tax-exempt real property used in connection with a business conducted for profit, subject to the exceptions therein specified, whether such property is owned by the United States, the State of Michigan or any of its political subdivisions or by hospitals, churches or other charitable institutions.

The exceptions specified in Act 189 to which the Act does not apply are:

1. Where the use is by way of a concession in or relative to the use of a public airport, park, market, fairground or other similar property which is available to the use of the general public.

2. In the case of federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed.

3. Property of any state-supported educational institution.

However, the fact that Act 189 provides for exceptions or exemptions does not make it discriminatory.

In *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937) which involved the constitutionality of the Alabama Unemployment Compensation Act the Court said at pages 509-510:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. See Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 S. Ct. 533; Lawrence v. State Tax Commission, 286 U. S. 276, 284, 76 L. ed. 1102, 1108, 52 S. Ct. 556, 84 A. L. R. 374. This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemptions infringe no constitutional limitations. (Citing many cases:)
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. (Citing cases.)
>
> This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

It should be noted that the personal property assessment roll of the City of Detroit for 1954 (Defendant's Exhibit 2, R. 97) not only contains United States property but also tax-exempt property of other taxing units of government which is leased and which is subject to the provisions of Act 189. Appellee's witness gave testimony as to the owner and lessee of each of the four parcels shown on the assessment roll (Defendant's Exhibit 2, R. 97), testifying that the owners of each were the United States or a municipal corporation of the State of Michigan (R. 33).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: October, 1957.